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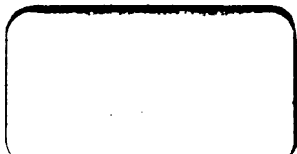
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND STATUTES CITED AND CONSTRUED
AND AN INDEX.

By SIDNEY R. MOON,
OFFICIAL REPORTER.

DANIEL W. CROCKETT, First Asst. Reporter.
LEE W. MOON, Second Asst. Reporter.

VOL. II,

CONTAINING CASES DECIDED AT THE MAY TERM, 1894, AND NOT
PUBLISHED IN VOLUME 10, AND CASES DECIDED AT THE
NOVEMBER TERM, 1894,

INDIANAPOLIS:
CARLON & HOLLENBECK, CONTRACTORS FOR THE STATE.
1895.

PUBLISHED
BY
AUTHORITY OF THE STATE OF INDIANA.

Rec. Jan. 21, 1896

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. ORLANDO J. LOTZ. * ‡

HON. GEORGE E. ROSS. † ‡

HON. GEORGE L. REINHARD. ‡

HON. FRANK E. GAVIN. ‡

HON. THEODORE P. DAVIS. ‡

* Chief Judge at May Term, 1894.

† Chief Judge at the November Term, 1894.

‡ Terms of office commenced January 1, 1893.

OFFICERS
OF THE
APPELLATE COURT

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

CASES

ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, [MAY TERM, 1894, IN THE SEVENTY-
EIGHTH YEAR OF THE STATE.

No. 1,160.

TALBOTT, ADMINISTRATOR, v. BARBER.

TRUST.—*Express Trust in Land.*—*Parol Agreement to Hold Proceeds of Sale of Land in Trust.*—*Consideration.*—*Inchoate Interest.*—While an express trust in land can not be established by parol, a parol agreement to hold the proceeds of a sale of the land, in trust for another, is valid, if based upon a sufficient consideration, and the conveyance, by a wife, of her inchoate interest is sufficient consideration to establish such a trust.

SAME.—*Parol Agreement of Mortgagee to Hold Part of Proceeds of Sale of Mortgaged Lands in Trust for Wife.*—*Inchoate Interest.*—*Statute of Frauds.*—*Fraud.*—Where the wife joined with her husband in executing a mortgage upon his real estate, as security to an existing creditor of the husband, and the wife joined therein only upon the parol agreement of the mortgagee that in consideration of her signing the mortgage with her husband, and of her agreement then made, that she would not appear to or resist a foreclosure of the mortgage, and that she would not redeem from the sale to be made on the foreclosure of the mortgage, he (the mortgagee) would take and foreclose the mortgage, and purchase the lands at the foreclosure sale, and would hold one-third of the land for her, and would protect her inchoate interest therein, and, as soon as he could sell the land, would pay her one-third of whatever should be realized from the sale of the

lands,—the mortgage as executed in connection with the parol agreement was not the creation of a trust in or concerning lands within the meaning of either of sections 3391 or 6631, R. S. 1894, nor was it a trust "in goods or things in action," as contemplated by section 6631, *supra*. The only thing the mortgagee was to do was to hold for, and pay to, the wife one-third of the proceeds of the sale, which was not an express trust in real estate, but in the proceeds of sale; and where the original agreement itself relates to the proceeds there need be no other promise after the sale is made. To establish such trust it is not necessary that the transaction should be tainted with fraud, but it is sufficient to bring the facts within the rule that (if the transaction would result in fraud upon the wife) the statute of frauds and trusts can not be used as an instrument to work a fraud.

SAME.—Devisee Acquiring Property Upon Which a Trust is Impressed.—Liability for.—In such case, where the mortgagee had purchased the lands at sheriff's sale, according to agreement, but died testate before receiving the deed therefor, having devised all such lands to his wife, who obtained a sheriff's deed therefor, with full knowledge of the trust, and sold the same, receiving therefor \$8,000, and held the same until her death, although often requested to pay to the beneficiary the one-third of the purchase-price, which she neglected to do, the estate of the mortgagee's wife will be held liable for the trust interest.

SAME.—Statute of Limitations.—Continuing or Executory Trust.—The trust being a continuing or executory one, the statute did not begin to run, even after the sale, until there was a disavowal of the trust or a refusal to perform upon proper demands, and the action being commenced within less than four years after the sale, it was not barred.

SAME.—Res Adjudicata.—Foreclosure of Mortgage.—Default.—The fact that the wife, the *cestui que trust*, was made a party to the foreclosure proceeding, was duly served with process, and made default, would not amount to *res adjudicata* so as to debar a suit on the trust agreement, where the default was a part of the special agreement creating the trust.

SAME.—Evidence.—Decedent's Estate.—Permitting Claimant to Testify.—Abuse of Discretion.—Where plaintiff's two daughters, competent witnesses, had, as the court determined, made out a *prima facie* case for plaintiff, it was not error, under such circumstances, for the court, of its own motion, to call the plaintiff to the witness stand and permit her to give her version of the transaction in relation to the trust, the suit being a claim against a decedent's estate.

From the Montgomery Circuit Court.

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B. Crane and A. B. Anderson, for, appellant.

G. W. Paul and A. D. Thomas, for appellee.

REINHARD, J.—The appellee filed a claim against the estate of appellant's decedent. The statement of the claim consisted of a complaint in one paragraph, to which a demurrer was filed and overruled. The appellant then filed an answer in five paragraphs, the first being a general denial, and the others pleas of the statute of limitations of six, ten and fifteen years, respectively, excepting the fifth paragraph, which was an answer of *res adjudicata*. Demurrers were sustained to all the affirmative answers but the fourth paragraph, and proper exceptions were reserved to all the adverse rulings, by the appellant. A reply of general denial placed the cause at issue. The first error assigned and discussed assails the ruling upon the demurrer to the complaint.

The substance of the complaint is that during the year 1872 the appellee, Susan Barber, was the wife of Thomas Barber, then alive, but since deceased; that she and her said husband then resided in Hendricks county, Indiana; that her said husband was then the owner in fee of one hundred and sixty acres of land in Hendricks county, Indiana, of the value of \$7,500, in which the appellee then had her inchoate right and interest as the wife of said Thomas Barber.

Then follows a description of the land, which we omit.

It is then averred that while appellee and her said husband were in possession of said land, he being the owner as aforesaid, to wit, on the 2d day of October, 1872, her said husband was indebted to Jesse Durham, the husband of the decedent, Isabel Durham, in the sum of \$4,000, evidenced by the promissory notes of said Thomas Barber for said amount; that said Thomas Barber was largely indebted to other persons far above

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his ability to pay, and said Jesse Durham was urging said Thomas Barber to execute to him a mortgage on said lands to secure his said debt and give him a preference over other creditors, and on the 6th day of March, 1873, said debt to said Jesse Durham being still unpaid, the said Thomas Barber agreed to execute to him a mortgage on said lands to secure said debt, and that then the said Jesse Durham came to the appellee (then the wife of said Thomas Barber) and requested her to sign said mortgage with her said husband, which she refused to do; that said Jesse Durham, being desirous of obtaining a mortgage on the entire interest in said lands to avoid any trouble in regard to the title in making sale of the same, said Jesse Durham then and there agreed with the appellee that in consideration of her signing said mortgage with her husband, and of her agreement then made that she would not appear to or resist a foreclosure of said mortgage, and her agreement not to redeem from said sale to be made on the foreclosure of such mortgage. he, the said Jesse Durham, agreed that he would take and foreclose said mortgage and purchase said lands at the sheriff's sale to be made on such foreclosure, and hold one-third of said land for the appellee, and would protect her one-third inchoate interest therein, and that as soon as he could sell said land he, the said Jesse Durham, would pay the appellee one-third of whatever should be realized from a sale of said lands when the same should be sold; and that appellee reposed great confidence in said Durham, and relying on his said promises and agreements, and by reason of the confidence she reposed in him, and without any other consideration whatever, signed and executed said mortgage with her said husband, and that appellee fully performed all and every part of said agreement on her part, and that said agreements were entered into without any

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fraudulent intent; that said Durham received and accepted said mortgage under said agreement, and afterwards foreclosed the same in the Hendricks Circuit Court, in the State of Indiana, and caused a certified copy of the decree of foreclosure to be issued by the clerk of said court to the sheriff of the proper county; that after the sheriff had duly advertised said lands for sale under said decree, and on the day set for the sale of said lands, the said sheriff duly offered the same for sale to satisfy said decree, and said Jesse Durham bid therefor the sum of said debt and costs, and he being the highest and best bidder therefor the said sheriff struck off and sold the said land to said Jesse Durham and issued to him a certificate of purchase under said decree; that afterward, and before the year of redemption had expired, in pursuance of said agreement, and to enable said Durham to make sale of said land, the appellee and her husband surrendered the possession of said land to said Durham, and he leased the same to a tenant, and before the year of redemption had expired said Jesse Durham died testate, having, by his will, duly probated in Montgomery county, Indiana, bequeathed and devised to said Isabel Durham, the decedent, all his interest in all said lands, and that she took possession of the same and received the said certificate of purchase therefor, and that afterwards, on the 16th day of July, 1875, obtained a sheriff's deed for said lands, without paying any consideration for the same; that she had full notice and knowledge of the aforesaid facts and agreements between appellee and said Jesse Durham, and that said Isabel Durham received the rents and profits of said lands for thirteen years, to the amount and value of \$400 per year, and that on the 1st day of August, 1888, said Isabel Durham sold and conveyed said lands to one Matthias A. Roof, and received the entire purchase-price therefor, amounting to \$8,000, and held and

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retained the same until the time of her death, although the appellee, after said sale, often requested her to pay one-third of the purchase-price of said lands to her, which she neglected to do, and that there is due the appellee one-third of said \$8,000, to wit, \$2,666.66, and one-third of the rents of said land, together with six per cent. interest thereon from the date of said sale.

Wherefore she prays judgment for \$4,000 and all proper relief.

It is earnestly contended that the complaint seeks a recovery on an express trust created by parol, which is in violation of the plain provisions of the statute. R. S. 1894, sections 3391, 6631 (R. S. 1881, sections 2969, 4906).

The section first cited is as follows: "No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

The last section referred to reads thus: "Every conveyance of any existing trust in lands, goods, or things in action, unless the same shall be in writing, signed by the party making the same or his lawful agent, shall be void."

It is plain, to our minds, that the mortgage executed by the appellee and her husband under the alleged agreement was not the creation of a trust in or concerning lands within the meaning of either of the sections quoted.

Nor do we think it was a trust "in goods or things in action," as contemplated by the section last above set out. It can certainly not be maintained that under the agreement the mortgagee was to hold the title of the land for the benefit of the appellee. Whatever right or title she had in such land she conveyed away by the

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execution of the mortgage and the agreement not to defend the foreclosure, and not to redeem. By the terms of the agreement, Jesse Durham not only acquired the legal title but also the absolute right to dispose of the same at his own will and pleasure. The only thing he was required to do was to hold for and pay to the appellee one-third of the proceeds of the sale. It is true there is an averment that he agreed to "hold" a one-third interest in the land for the appellee, and that he would "protect" her one-third interest, but all this must have reference to the proceeds of the sale as is clearly indicated in the last portion of the alleged agreement in which he promised to "pay" her one-third of whatever should be realized from the sale.

Such an agreement is not void by the statute as an express trust in real estate. While an express trust in land can not be established by parol, a parol agreement to hold the proceeds of a sale of the land, in trust for another, is valid, if based upon a sufficient consideration. Such an arrangement may constitute a trust in the proceeds of the sale, that is, in the money realized from the sale, but not an express trust in the land. *Mohn v. Mohn*, 112 Ind. 285; *Worley v. Sipe*, 111 Ind. 238; *Thomas, Admr., v. Merry*, 113 Ind. 83. It is not necessary to cite authorities to the proposition that the conveyance of appellee's inchoate interest is a sufficient consideration for the agreement relied upon in the complaint. See, however, *Worley v. Sipe*, *supra*.

Appellant's counsel contend that the cases above cited do not support the position that a trust may be established and enforced in the proceeds of a sale of land unless it be on the condition that the grantee, subsequently to the sale of the land, agree to hold such proceeds in trust for the grantor or person designated by him. In this construction of the decisions referred to,

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we think counsel have misapprehended the ruling of the court. We understand the rule to be that even though the original agreement establish a trust in land, which is not enforcible under the statute, yet, if after the sale the grantee agrees to hold the proceeds in trust for the person designated, equity will enforce such a trust notwithstanding the statute, the original agreement being a sufficient consideration therefor. But we do not understand that if the original agreement itself relates to the proceeds, there must be another promise after the sale is made. The general rule in such cases is applied that a trust in personal property, of the character of the one in the present case, may be enforced, if founded on a sufficient consideration. Here there was no agreement, at any time, that Durham should hold a part of the land itself in trust for the appellee.

The latter, as we have found, parted with her title as fully as if she had made an absolute conveyance of the property. The only agreement tending to create a trust related to the proceeds arising out of a sale of the land, and not to the land itself, and we can see no good reason why such an agreement, made in the first instance, and before the conveyance, should not be as capable of being enforced as one made after the sale of the land, which was itself the subject of a trust.

Counsel for appellant insist that to establish a resulting trust in such a case as this the transaction must be tainted with fraud, or some fraudulent act must be shown to have been committed by the grantee. We do not think this was necessary. It is sufficient to bring the facts within the rule if the transaction would result in a fraud upon the grantor, for the statutes of frauds and trusts can not be used as instruments to work a fraud. *Marcilliat v. Marcilliat*, 125 Ind. 474; *Catalani v. Catalani*, 124 Ind. 54; *Stuart v. Brown*, 135 Ind. 232.

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It is further contended by appellant's counsel that if there was any liability at all it was for a portion of the purchase-money, and that for this the estate of Jesse Durham alone could be held, and a claim for the same against the estate of his wife can not be enforced.

The appellant's decedent, in the case before us, can not be placed in the position of an innocent purchaser of the lands without notice. She took the real estate as a devisee of Jesse Durham, to say nothing of the averment that she had full notice and knowledge of the trust. She could acquire no greater right in the proceeds of the sale than her husband would have acquired. Whenever she sold the land and collected the proceeds the latter were charged or impressed with the trust in the hands of Isabel Durham.

The rule in such cases is explicitly and correctly stated by a standard author: "Wherever property, real or personal, which is already impressed with * a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, and compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive

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fraud or actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a *bona fide* purchaser for a valuable consideration and without notice." 2 Pomeroy's Eq. Jur. (2d ed.), section 1048.

Nor do we think the complaint discloses that the action is barred by the statute of limitations. The facts averred show that the appellee retained an interest in the proceeds of the land for which she conveyed her inchoate interest, and whenever such proceeds were realized by the sale of the land, Jesse Durham, or his devisee, became obligated to account for the trust. The trust was a continuing or executory one, and the statute did not begin to run, even after the sale, until there was a disavowal of the trust or the refusal to perform upon proper demand. *Parks v. Satterthwaite, Admr.*, 132 Ind. 411.

It is alleged in the complaint that the appellant's decedent sold the land on the first day of August, 1888, receiving therefor the entire proceeds of \$8,000, and that she held the same up to the time of her death. The complaint was filed March 31, 1892, which was less than four years after the sale.

We think the complaint states a cause of action, and the demurrer was properly overruled.

What we have already said disposes of the alleged errors of sustaining demurrers to the paragraphs of answer setting up the various statutes of limitations. As we have seen, the agreement declared upon was more than a mere promise to pay the purchase money, but was the establishment of a trust in the proceeds of the sale of one-third of the land. This trust being an executory one, the statute of limitations has not barred a recovery.

The plea of *res adjudicata*, to which a demurrer was

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sustained, was clearly insufficient. The gist of it is that the appellee was duly served with process in the foreclosure proceedings, but failed to appear, and that judgment was rendered against her by default. This, however was one of the very things she contracted to do, according to the averments of the complaint, and it was partly this agreement not to appear which constituted the consideration of the trust. It is doubtless true, as a general rule, that where the wife of a mortgagor of real estate, in which she has an inchoate interest, is brought into court by summons in a foreclosure proceeding and fails to set up any claim or interest she is concluded by the decree. But this rule can have no application to the facts in the present case. We apprehend that no court would debar a litigant, who, by special agreement, suffered default and judgment to be taken against him in consideration of some benefit enuring to him, from showing that fact.

The answer under consideration is not any different from the averments of the complaint in reference to the facts touching the decree of foreclosure, and, if the complaint is good, as we have decided it to be, the answer is necessarily bad.

The overruling of the motion for a new trial is assigned as error. It is urged that the evidence is insufficient to support the finding. We have examined the evidence, and, while it is not as satisfactory as we could wish it to be, we think it tends to sustain the finding in all essential points.

It is further insisted, in connection with the ruling upon the motion for a new trial, that the court erred in admitting testimony in proof of the parol agreement relied upon. Our ruling upon the sufficiency of the complaint fully disposes of this question, and we need not further consider it.

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The court, of its own motion, called the appellee to the stand to testify as a witness. The appellant urges that this was an abuse of its discretion, under section 510, R. S. 1894 (section 502, R. S. 1881), which provides that the court may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion shall be reviewable on appeal.

Under former statutes, the action of the court in exercising the discretion of allowing a party to testify in such cases, was not subject to review by the appellate tribunal. *Perrill, Admr., v. Nichols*, 89 Ind. 446.

But the present statute expressly provides that the exercise of the discretion is reviewable, and it therefore becomes the duty of the court, on appeal, to examine into the circumstances under which the discretion was exercised. Every case where the discretion has been exercised must necessarily be determined upon its own merits, and no general rule which would be applicable in all cases can be laid down. *Willitts, Admr., v. Schuyler*, 3 Ind. App. 118; *Forgeron v. Smith, Admr.*, 104 Ind. 246.

In the case before us, two competent witnesses, daughters of the appellee, had testified before the court called the appellee to the stand. These witnesses had, as the court determined, made out a *prima facie* case for the appellee. Under these circumstances we do not think it was an abuse of the discretion vested in the court to permit the appellee, who would otherwise have been incompetent under sections 506, 507, R. S. 1894 (R. S. 1881, sections 498, 499), to give her version of the transaction.

Other questions of minor importance are presented, but we think we have covered the entire ground upon which the several alleged errors are based, and it will

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not subserve any good purpose to prolong this opinion by noticing such questions in detail.

While we must freely admit that there are features about this claim that do not impress it with that high character of merit that might be desired, we must adhere to the rule of indulging every presumption in favor of the correctness of the judgment until it be overcome by an affirmative showing of some prejudicial error.

The judgment is affirmed.

Filed Oct. 18, 1894.

No. 1,384.

THE TERRE HAUTE AND LOGANSPORT RAILROAD COMPANY v. WALSH.

RAILROAD.—*Permitting Fire to Escape from Right of Way.—Damages.*

—*Sufficiency of Complaint.*—A complaint for damages alleged to have been caused by fire negligently permitted to escape from a railroad company's right of way is sufficient, which alleges that the company negligently permitted combustible material to accumulate on its right of way, and negligently permitted fire to be communicated thereto, from one of its passing engines, and negligently permitted the fire to spread to plaintiff's meadow land, whereby plaintiff was damaged, etc.

SAME.—*Damage to Land by Fire.—Opinion Evidence.—Depreciation in Value.*—The question before the court and jury being as to what extent the meadow had been damaged by the fire, it was not error to allow plaintiff, a farmer, as a witness in his own behalf, to state his opinion as to the depreciation of his meadow from the first to the second year, where it appears that the meadow had been sown four years, and that three crops had been harvested from it.

SAME.—That the evidence is sufficient to support the verdict against a railroad company for negligently permitting fire to escape from its right of way, onto plaintiff's land, etc., see opinion.

EVIDENCE.—*Opinion Evidence.—Drainage.*—The plaintiff, a farmer and owner of land damaged by fire, was competent to give his opinion as to what would be necessary to put the drainage in the damaged land

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in condition for draining the land, without showing that he was an expert on the subject of drainage.

SAME.—When Within Issues.—Damage to Land by Fire.—Amendment of Pleading.—In an action for damages to fifty-five acres of meadow land, by fire, includes within the issues any portion of the fifty-five acres of meadow which was used for pasturing purposes, and the value of the pasture may be proved; or, as the complaint might have been amended so as to bring such fact in issue, it will be deemed to have been so amended.

DAMAGES.—Excessive.—Injury to Land by Fire.—That the damages assessed for injury to land by fire were not excessive, see opinion.

From the Fulton Circuit Court.

E. Myers, for appellant.

G. W. Holman and *R. C. Stephenson*, for appellee.

REINHARD, J.—Action by the appellee against the appellant to recover damages for injury to his land alleged to have been caused by the appellant's negligence in permitting fire to escape from its locomotive engine, and in permitting grass and weeds to accumulate on its right of way.

The first question we are to determine relates to the overruling of the demurrer to the complaint. It is urged against the complaint that it states no fact from which the court could have inferred that the loss resulted from the appellant's negligence.

The averments of the complaint touching upon the question of appellant's negligence are as follows:

That from the 10th day of June, 1893, up to August 22, of the same year, "there had been no rains of any consequence, and as a result vegetation had become dry and inflammable; that the company had negligently permitted grass and weeds to grow upon its said right of way on said land above described, and on said date the same was dry and easily fired; that in the afternoon of said day (August 22) "the pay car of the company passed over the road, going north, and attached thereto was an

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engine of the company, from which sparks were negligently permitted to escape, and fired the weeds and grass and other combustible matter then accumulated on the defendant's said right of way, on the land herein above described on the west side of the company's track; * * * that the fire so negligently started, but without fault on the part of plaintiff, as herein above averred by the defendant, was by it negligently permitted to escape from off its right of way, but without any fault on the part of the plaintiff, onto said tract of land of the plaintiff, and spread over, consume and burn and destroy plaintiff's meadow," etc.

The complaint is sufficient to withstand the demurrer. *Lake Erie, etc., R. R. Co. v. Clark*, 7 Ind. App. 155; *Ohio, etc., R. W. Co. v. Trapp*, 4 Ind. App. 69; *Lake Erie, etc., R. R. Co. v. Griffin*, 8 Ind. App. 47; *Chicago, etc., R. R. Co. v. Williams*, 131 Ind. 30; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275.

The next alleged error arises from the overruling of the appellant's motion for a new trial. It is urged, in the first place, that the court erred in permitting appellee as a witness in his own behalf to state his opinion as to the depreciation of his meadow from the first to the second year. It appears that the meadow had been sown four years, and three crops of hay had been harvested from it before the fire. The only discussion of this question in the brief of appellant's learned counsel, after stating the point substantially as we have stated it, is as follows: "Now appellee could only recover for the value of the meadow at the time of the fire, under the most favorable view. And to permit him to state what the condition of the meadow was two years before that time was certainly an error on the part of the court. The answer to the effect that the meadow was better the second year than the first in no way tends to inform the

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jury as to the value of the same two years later. Its only effect must have been to confuse and mislead the jury."

The question before the court and jury was as to what extent the meadow had been damaged by the fire. The claim of the appellee was that the meadow had been entirely destroyed. If this was true, the jury, in order to arrive at the approximate amount of the injury would be entitled to know the probable quantity and quality of hay that could have been made from the meadow but for the fire. It was therefore proper to show, if true, that as the meadow becomes older the quantity and quality of the hay becomes better on the kind of land upon which this meadow was located, and how long the meadow continues to improve until it begins to deteriorate. This was the nature of the testimony the appellee was permitted to give. It furnished the jury some basis for estimating the value of the meadow before and after the fire, and there was no error in overruling the objection to the testimony.

The court permitted the appellee, over the appellant's objection and exception, to answer the following question: "What will be necessary to be done to put that drainage in condition for draining the land?" It is insisted that as the appellee has not been shown to be an expert upon the subject of drainage he could not properly be permitted to give an opinion, except upon facts testified to by him. The witness answered the question by stating that the portion of the low land that was burned out beneath the tile bed would not hereafter have sufficient fall for drainage.

We are of opinion that the appellee, who was a farmer, and the owner of this particular farm which it was claimed had been damaged by fire, was sufficiently com-

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petent to testify upon the subject. The weight and importance of the testimony was for the jury.

Another question propounded to this witness relates to the value of the meadow for pasture. It is urged in this connection that nothing is claimed in the complaint on account of the loss of pasture, and that the question was therefore not within the issues. Appellee's counsel insist that this question is not properly presented in the record. Assuming, without deciding, that the question is before us, we do not think there is any available error on account of the admission of this testimony. The damage to the pasture was a legitimate element in the case. If no specific damages for this item had been claimed in the complaint, the court would, upon application, have permitted the appellee to amend his pleading. This court will deem the amendment to have been made.

It is proper to state here, however, that the complaint alleged that the fire consumed and destroyed the meadow, being 55 acres, to his damage \$500. We think this averment included any portion of such 55 acres of meadow which was used for pasturing purposes.

Other testimony was admitted over appellant's objection, but without stopping to notice each ruling complained of in detail, suffice it to say that we have examined the same and have not been able to discover any erroneous ruling in connection with the admission of testimony. We also think the measure of damages was correctly declared and acted upon by the trial court as being the difference in the value of the land (the 80 acres affected by the fire) before and after the fire. *Chicago, etc., R. R. Co. v. Smith*, 6 Ind. App. 262; *Chicago, etc., R. R. Co. v. Kern*, 9 Ind. App. 505.

There was no evidence of the manner in which the fire

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originated. One witness testified that he saw the appellant's pay car pass over the track shortly before the fire, but he did not pretend to state that the sparks emitted from the engine attached to it started the fire on appellant's right of way, as alleged in the complaint, nor did he testify that the pay car had an engine attached to it. The appellant therefore insists that there is a total failure of proof of the negligence set up in the complaint.

The negligence relied upon was twofold:

1. Negligently allowing sparks of fire to be emitted from the engine.

2. Negligently allowing grass and other combustible material to accumulate on its right of way.

Proof of either of these would be sufficient if the negligence proved can be said to have been the proximate cause of the injury. The witness referred to testified that about a minute after the pay car passed the point near which he was at work, he saw smoke, and that shortly afterwards he discovered fire in the same place burning the weeds and grass on the right of way.

If the appellant negligently suffered the fire to escape from the right of way, it is liable, though not liable for the act of setting fire upon the right of way. *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111; *Pittsburgh, etc., R. W. Co. v. Jones*, 86 Ind. 496; *Brinkman v. Bender*, 92 Ind. 234; *Louisville, etc., R. W. Co., v. Ehler*, 87 Ind. 339; *Wabash, etc., R. W. Co. v. Johnson*, 96 Ind. 40; *Louisville, etc., R. W. Co. v. Nitsche*, 126 Ind. 229.

We think the presence of the inflammable materials on the appellant's right of way, so as to permit fire to start and spread to the adjoining lands was a sufficient proof of the second cause of negligence alleged.

It is further insisted that there is a failure of proof because it was not shown that appellant owned or operated a railroad:

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If it was necessary to make this formal proof we think the evidence is sufficient upon this point. John Walsh testified that he knew where the Terre Haute and Logansport railroad, or what is known as the Vandalia railroad, was located; that it runs from Terre Haute to South Bend and through the west part of this (Fulton) county, through Wayne, Union and Aubbeenaubbee townships; also that the company's right of way runs through the east half of the northeast quarter of section 15, on the appellee's farm. This, in connection with the witness's testimony that he saw the pay car running over this railroad on the day of the fire, we regard as sufficient proof upon the subject under consideration. The evidence, we think, supports the verdict on every material point.

One of the grounds assigned for a new trial was excessive damages. The verdict was for \$600 but the appellee voluntarily remitted \$100 of this amount, and the court rendered judgment for \$500.

It is insisted that the greatest amount for which the jury could have found in favor of the appellee under the evidence was \$383. This contention is based upon the assumption that only fifty-five acres of the appellee's meadow land were damaged by the fire. There is evidence tending to show, however, that the deterioration of the entire eighty acre tract was \$5 per acre.

Under the rule heretofore stated as to the measure of damages, this evidence was proper for the jury to consider, and if they found, as they legally might have done, that the damages to the land were \$400, the damages for which appellee recovered judgment was not excessive. According to the appellant's own showing the damages for the rails burned and tiling injured amounted to \$108.

While the evidence is not very satisfactory upon the

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subject of damages, we are not able to say that it fails to support the verdict to the extent of the amount to which it was reduced by the remittitur.

Judgment affirmed.

Filed Oct. 30, 1894.

No. 1,506.

SWARTS v. COHEN ET AL.

PROMISSORY NOTE.—*Ambiguity as to Maker.*—*Signing Corporate Name and Official Name.*—*Parol Evidence Admissible to Clear up Ambiguity, Under Proper Averments.*—Where a promissory note was signed,

“NATIONAL FORGE & IRON CO.,

“MARK SWARTS, *President*,”

it is ambiguous as to who executed the note, *i. e.*, whether it is the individual note of Swarts (as alleged in the complaint), or the note of the National Forge and Iron Co. (as alleged in answer), or the joint obligation of both, and parol evidence is admissible to clear up the ambiguity.

From the Lake Circuit Court.

J. B. Peterson, for appellant.

W. C. McMahan and *F. J. Trainor*, for appellees.

Lotz, C. J.—The note upon which this action was brought is in these words:

“NATIONAL FORGE & IRON CO.,

“\$1,675.82.

CHICAGO, June 4, 1891.

“Ninety days after date we promise to pay to the order of Samuel Cohen sixteen hundred and seventy-five ⁸²/₁₀₀ dollars, payable at our office. Value received.

“NATIONAL FORGE & IRON CO.,

“No. 177. Due ———.

MARK SWARTS,

“*President*.”

The complaint avers that the note was executed by the

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National Forge and Iron Co. and by Swarts as joint makers; that the note was given for money loaned to the defendant Swarts, and for no other or different consideration, and that no part of the consideration moved to the National Forge and Iron Co. There was no service of process upon the National Forge and Iron Co., and the action proceeded against the defendant Swarts alone.

He filed an answer of *non est factum*, and also a special answer, in which he averred that he was the president of the National Forge and Iron Co., a corporation; that said corporation being indebted to the plaintiff, did, by its president, execute the note sued on to evidence such indebtedness; that he received no part of the consideration of said note, but that the entire consideration was received by the corporation; that said note was not his individual note, nor the joint note of himself and the corporation, but the note of the corporation alone.

He also filed a cross-complaint, in which he sought to have the note reformed, alleging that the note was executed by the National Forge and Iron Co., by himself, for and on behalf of such corporation, as the president thereof; that by the mutual mistake and accident the word "by" was omitted before his name in signing said note.

The cause was put at issue. The issues joined on the complaint and answers were submitted to a jury, and those joined on the cross-complaint were tried by the court. The trial resulted in a finding and judgment in favor of the appellee for the full amount of the note, including interest.

The errors assigned are that the complaint does not state facts sufficient to constitute a cause of action, and that the trial court erred in overruling the motion for a new trial.

It seems to be well settled by the decisions in this State

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that when a note is signed by an individual maker with such a word as "trustee," "president" or "secretary," immediately following the signature, such word is generally considered as merely descriptive of the person of the maker, and the note is the obligation of the person so signing it. *Kendall v. Morton*, 21 Ind. 205; *Hays v. Crutcher*, 54 Ind. 260; *Hayes v. Mathews*, 63 Ind. 412; *McClellan v. Robe*, 93 Ind. 298; *Williams v. Second Nat'l Bank, etc.*, 83 Ind. 237.

But when it is apparent, from the manner of the signature, or from the body of the instrument or from the use of the corporate seal, that it was the intention of the contracting parties that the note should bind the corporation alone, then the person signing will not be liable. *Means v. Swormstedt*, 32 Ind. 87; *Gaff v. Theis*, 33 Ind. 307; *Pearse v. Welborn*, 42 Ind. 331; *Armstrong, Admr., v. Kirkpatrick*, 79 Ind. 527.

It is difficult to lay down a general rule that will govern all cases. The primary purpose in construing a written instrument or contract is to ascertain the intention of the contracting parties. If a written instrument is clear and unambiguous in its terms and meaning, there is no occasion for construction.

The appellee contends that the note in suit is the joint note of both the appellant and the National Forge and Iron Co., while the appellant insists that it is the note of the corporation alone. The note in suit differs from any of the Indiana cases to which our attention has been called. In looking into the adjudications of other States we find that much conflict and confusion exists.

In *Falk v. Moebs*, 127 U. S. 597, it is said that this conflict amounts to almost anarchy of the authorities.

In the following cases notes and bills of exchange similarly signed as the one in suit were held to be the

obligation of the corporation alone: *Draper v. Massachusetts, etc., Co.*, 5 Allen, 338; *Rendell v. Harriman*, 75 Me. 497; *Castle v. Belfast, etc., Co.*, 72 Me. 167; *Sturdivant v. Hull*, 59 Me. 172; *Carpenter v. Farnsworth*, 106 Mass. 561; *Liebscher v. Kraus*, 74 Wis. 387.

Many other cases might be cited to the same effect. On the other hand, notes and bills somewhat similarly signed have been held to be the individual obligation of the person signing them or the joint obligation of the corporation and the individual. *Chase v. Pattberg*, 12 Daly, 171; *Kean v. Davis*, 21 N. J. Law, 683; *Fiske v. Eldridge*, 12 Gray, 474; *Tucker, etc., Co. v. Fairbanks*, 98 Mass. 101; *DeWitt v. Walton*, 9 N. Y. 571; *McClellan v. Reynolds*, 49 Mo. 312; *Heffner v. Brownell*, 70 Iowa, 591; *Heffner v. Brownell*, 75 Iowa, 341; *McCandless v. Belle Plaine, etc., Co.*, 78 Iowa, 161.

In many of the cases the decision of the court turns on a very slight change in the terms of the instrument or the manner in which it is signed.

If a written instrument is uncertain or its meaning can not be definitely determined upon its face, extrinsic evidence may, under proper averments, be given not to vary the terms, but to clear up the ambiguity. This is especially true where the action is between the original parties to the contract. *Daniel's Negot. Inst.*, section 418; *Parsons Notes and Bills*, 168; *Haile v. Peirce*, 32 Md. 327; *Hardy v. Pilcher*, 57 Miss. 18; *Baldwin v. Bank*, 1 Wall. 234; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Metcalf v. Williams*, 104 U. S. 93; *Brockway v. Allen*, 17 Wend. 40.

Courts of equity will sometimes relieve against mistakes of law and will reform a written instrument so as to make it conform to or speak the intention of the parties. This is particularly true when words are used

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to express a contract previously made. 1 Story Eq. Juris., section 115; 2 Pom. Eq. Juris., section 845.

In *Lee v. Percival*, 52 N. W. Rep. 543, suit was instituted upon a note as follows:

“Six months after date * * we promise to pay Lee & Jameson or order three hundred and fifty dollars * * *”

Signed as follows:

“HERNDON NATURAL GAS AND LAND COMPANY.

“F. A. PERCIVAL, President,

“ALEX. HASTIE, Secretary.”

It was held that Percival and Hastie were *prima facie* liable, but might have the note reformed so as to express the true intent of the parties, and that parol evidence was admissible for the purpose of showing that the note was the obligation of the corporation alone. So, where a note was signed “W. T. Boutell, Pres.,” it was held proper for the signer to show by parol that he was the president of the corporation, and signed for the corporation. *Brunswick, etc., Co. v. Boutell*, 47 N. W. Rep. 261 (Minn.).

A note reading, “we promise to pay to the order of A. J. Boardman, Treasurer.” * * *

“(Signed) MINNEAPOLIS ENGINE AND MACHINE
WORKS.

“By A. L. CROCKER, Secretary,”

and indorsed “A. J. BOARDMAN, Treasurer,”

the indorsement was held to be *prima facie* the indorsement of Boardman, but that extrinsic evidence was admissible to show that he made it only in his official capacity as treasurer, and that the indorsement was that of the corporation alone. *Sanhigan Nat'l Bank v. Boardman*, 48 N. W. Rep. 1116 (Minn.).

In *Liebscher v. Kraus*, 74 Wis. 387, the action was on a note in these words: “Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six

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hundred and thirty-seven dollars and forty cents, value received.

"SAN PEDRO MINING AND MILLING COMPANY.

"F. KRAUS, President."

This was decided to be the note of the corporation alone, and not the joint note of the corporation and Kraus; that there was no ambiguity, and that parol evidence was inadmissible to show that Kraus did not sign the name of the company, but signed his own name as a joint maker.

In *Heffner v. Brownell*, *supra*, and the same case in 70 Iowa, 591, the note was in substance as follows:

"* * * We promise to pay Daniel Heffner, or bearer, two hundred dollars. * * *

"INDEPENDENCE MFG. CO.

"B. I. BROWNELL, Pres.

"D. B. SANDFORD, Sec'y."

This was held to be the joint note of the corporation and of the other persons signing the same; that there was no ambiguity appearing upon the face of the instrument, and that extrinsic evidence was inadmissible to show the intention of the parties.

Matthews v. Dubuque Mattress Co., 54 N. W. Rep. 225, was an action on a note very similar to the one in suit. It reads as follows:

"Ninety days after date, we promise to pay to the order of J. T. Matthews & Co. two hundred and ninety and eighty-seven one-hundredths dollars. Payable at the office of the Dubuque Mattress Co., Dubuque, Iowa. Value received. Accepted March 21st, 1889.

"DUBUQUE MATTRESS CO.

JOHN KAPP, Pt."

This was held to be the note of Kapp as well as of the corporation, and that parol evidence was not admissible to show that the corporation was the only promisor.

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There is, however, an able dissenting opinion, in which the position is taken that the note is ambiguous on its face, and that parol evidence should have been admitted to clear up the ambiguity.

We are of the opinion that the note in suit is ambiguous. It was upon that theory that the case proceeded, was tried and determined in the court below. The appellee declared, in his complaint, that the appellant executed the note. If John Doe should execute his promissory note in the name and style of Richard Roe, he would be liable thereon, and extrinsic evidence would be admissible to show the manner of the execution under proper averments in the pleadings.

As was said by the Supreme Court in *Gaff v. Theis, supra*: "A party may, we suppose, execute a note in any name other than his own, and yet be bound by it."

It is readily conceivable that the note in suit might have been executed by both the corporation and by Swarts, and be their joint obligation. In such a case, affixing the word "president" to his name does not make it the note of the corporation only, but, under proper averments, it may be shown to be the obligation of the individual as well, and this may be made to appear by extrinsic evidence.

We find no error in the record.

Judgment affirmed, at the costs of appellant.

Filed Oct. 31, 1894.

The Salem Bedford Stone Company v. Hobbs, Administrator.

No. 1,305.

THE SALEM BEDFORD STONE COMPANY v. HOBBS, ADMINISTRATOR.

MASTER AND SERVANT.—Obvious Danger.—Personal Injury of Servant.
—*Nontiability of Master.*—*Stone Quarry.*—Where it appears that the servant of a stone quarry company, whose duty it was to assist in moving stone from place to place, by the use of a traveler and “dogs,” had equal opportunity with the company to observe the position and appearance of the stone, which fell upon him while he was attaching the “dogs” thereto, inflicting mortal injuries, the position and appearance of the stone being clear and open to the observation of every one, the company is not liable in damages for the death of the servant.

From the Lawrence Circuit Court.

M. F. Dunn, for appellant.*W. H. Martin, J. E. Boruff, J. R. East and R. G. Miller*, for appellee.

DAVIS, J.—The material averments in appellee’s complaint are that appellant, on the — day of —, 1892, owned and operated a stone saw mill, with engines, derricks, traveler on a tramway three hundred feet long, sixty feet wide and thirty feet high, and other machinery; that the traveler was used to raise and move blocks of stone over and around the yard connected with said mill.

“The officers, agents, foreman and superintendent, prior to and at the date of the grievances hereinafter complained of, had carelessly and negligently piled, and caused to be piled, huge stones, blocks of stone of irregular size, shape, structure and uneven surface most all over the yard or space between the different bents of said tramway; that defendant carelessly allowed these stones of irregular surface of different sizes and different

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dimensions, different lengths and thicknesses, to be carelessly laid upon one another, and to be piled and wedged in between and on one another, and had carelessly and negligently permitted great piles of stone to accumulate in said yard. Said defendant had piled, and caused to be piled, stones as above set out in said yard or space between the different bents of said tramway, on made ground, which had, after said careless and negligent piling and placing of said stone, and prior to the date of the grievances herein set forth, given away and crumbled and become lower in some places than others, and had disarranged the stone so negligently piled as aforesaid, and thereby caused said place to become dangerous and unsafe to defendant's employes."

That on said day James F. Hobbs was at work for appellant on said yard beneath the traveler that ran over said tramway, and while in the line of this duty, and without any knowledge of the dangerous condition of said yard, in the act of hooking a set of dogs onto a stone to be raised or moved by said traveler, and without any notice, knowledge or fault on his part, one of said stones, so carelessly and negligently piled and placed, slid upon or turned over on said Hobbs and so injured him as to cause his death; that he left a widow surviving him, and that said appellee was the duly appointed, qualified and acting administrator of his estate.

A demurrer to the complaint was overruled. Counsel for appellant contends that the complaint is insufficient because there is no charge that the widow has been damaged in any manner. The substance of counsel's argument is that the complaint should charge that she was dependent on her husband for support, and that the suit was prosecuted in her interest and for her benefit.

The section of the statute on which the action is based reads as follows: "When the death of one is caused by

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the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Section 284, R. S. 1881 (section 285, R. S. 1894).

If the complaint is sufficient in other respects, all that is necessary on this question, in our opinion, is to aver that there are such persons to whom, under the statute, the damages recovered may inure. *Stewart, Admr., v. Terre Haute, etc., R. R. Co.*, 103 Ind. 44.

A special verdict was returned on which judgment was rendered in favor of appellee for seventeen hundred and fifty dollars.

One of the errors assigned is that the court erred in sustaining appellee's motion for judgment in his favor on the verdict.

The jury in their special verdict found that the appellant left the large stone sitting upon two small and irregular stones without any props or stays of any kind to keep the same from falling, and that the dirt beneath it was liable to give way, and allow the same to turn over suddenly upon its side, and that the stone had remained in that condition for some two or three months before the 23d of December, 1892; that it could have been discovered readily; that said stone was resting on two small stones on its edge, and was liable to fall over; that Hobbs had worked about the yard as hooker for several months prior to his death; that he had good eyes and hearing, was strong in physical health, and

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that he was familiar with lifting and taking out stone from said yard; that he had no knowledge that the stone was sitting on two small irregular stones, and that he had no knowledge that the same was liable to fall or turn over upon him; that the stone apparently sat up right, and that there was nothing in its appearance or about it to indicate that it was about to turn over, and that the place around and about said stone was then and there dangerous and unsafe, in which condition it had remained for two or three months, and that said stone "so placed upon two small irregular stones fell over and against the body and limbs of said Hobbs," etc.

The particular act of negligence attempted to be alleged in the complaint as the proximate cause of the injury is not clear. It is not a model pleading, but the charge as we understand it is that appellant carelessly and negligently piled, and caused to be piled, large stones—blocks of stone—of irregular size, shape, structure, and uneven surface, upon one another on made ground which had crumbled, given away, and become lower in some places than others, and had disarranged the stone so negligently piled as aforesaid, and thereby caused said place to become dangerous to appellant's employees. The giving away of the made ground under the stone so irregularly piled upon one another seems to be the act charged which rendered the place dangerous. It is alleged that one of these stones, so negligently and carelessly piled and placed upon one another on the ground which crumbled and gave away, slid upon and turned over on him without fault on his part. It will be observed that the complaint does not disclose that said decedent was ever in the service of the appellant prior to the day on which he was injured, and it is further alleged that he had no knowledge of the dangerous condition of the place.

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The jury do not find that huge blocks of stone were carelessly and negligently piled upon one another on made ground which had crumbled, given away and become lower in some places than others, thus disarranging the stone, and thereby causing the yard to become dangerous, and that one of said stones slid upon, and turned over on, said Hobbs. The jury find that a large stone was left sitting without props or stays, upon two small irregular stones, and that the dirt beneath it was liable to give away and allow the stone to turn over suddenly upon its side, but there is no finding that the dirt beneath the stone gave away. The finding is that the stone fell, but there is nothing to indicate that the condition of the ground had anything to do with the fall. The cause of the fall is not found, but the inference is that the stone fell because of the fact that it was sitting on edge without props or stays.

On the theory that the gist of the action is the breach of the duty on the part of the master to provide said Hobbs with a reasonably safe place to work, and that the particular act which rendered the place dangerous is not material, the verdict may be sufficient to sustain the judgment under the issue tendered by the complaint, but in view of our ultimate conclusion the determination of this question is not of vital importance.

It is earnestly insisted that the verdict of the jury is not sustained by the evidence. Giving the evidence the most favorable consideration in behalf of the appellee the facts are that appellant was engaged in the business described in the complaint; that said decedent commenced work for appellant when the mill plant was being erected, and continued for four or five months thereafter, prior to the accident, to work for the company as a hooker in and about the yard where he was injured. The traveler was used to lift the stone off the cars and

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set them in the yard, and to lift the stone out of the yard onto the car. The traveler contained two "dogs" or hooks, and it was the duty of the hookers to fasten or attach the hooks to the stone in order to unload it from, or to load it on, a car.

On the day the accident occurred there were three stones in close proximity to each other. One of the stones, about nine feet long, five feet wide and fifteen inches thick, was sitting on its edge, on two smaller stones about one foot thick, without any props or stays of any kind to keep the stone from falling over. The stone in question had been in this position for two or three months. The decedent had frequently, before the day he was injured, been around this locality, and on this day he had been working in this part of the yard during the afternoon, and at this particular place about ten minutes. He was a strong, robust man, thirty-two years of age, with good eyesight and good hearing, and in the full possession of all his faculties. The position and appearance of the stone were clear and open to the observation of every one. There is nothing in the complaint, verdict, or evidence indicating that there was any latent or hidden defect that contributed to the injury. The decedent and a fellow-workman, about three o'clock in the afternoon of December 23, 1892, were undertaking to remove one of the other stones referred to, and the decedent started to put the "dogs" attached to the ends of the chain of the traveler into the holes in one end of the stone which they were intending to move, when the stone above described fell against and on the decedent, causing the injuries which resulted in his death.

Conceding that the alleged negligence on the part of the appellant has been established, the question remains whether said employe should be held, under the facts

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and circumstances of this case, to have assumed the risks incident to the danger growing out of such negligence.

It is apparent, from the evidence, that said Hobbs had an equal opportunity with appellant to know of the unsafe and dangerous condition of the yard, arising out of the position of said stone, and the conclusion is irresistible that by casual observation he could have known of the danger prior to his injury. *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156 (161); *Blondin v. Oolitic Quarry Co.*, 11 Ind. App. 395; *Pittsburgh, etc., R. W. Co. v. Woodward*, 9 Ind. App. 169; *Ames, Admr., v. Lake Shore, etc., R. W. Co.*, 135 Ind. 363; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; *Day v. Cleveland, etc., R. R. Co.*, 137 Ind. 206.

In *Day v. Cleveland, etc., R. R. Co.*, *supra*, Judge McCABE says: "In a case where the servant is one of mature age and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger. * * * The law requires that men shall use the senses with which nature has endowed them, and when without excuse one fails to do so, he alone must suffer the consequences; and he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature had given him. * * * Therefore, on the appellant's own testimony, and all the other evidence tending to support it, and giving it a construction the most favorable to the appellant, he can not recover."

It is true that was not a case in which the master had furnished an unsafe place to work. In that case the employe, a carpenter, was directed to assist the painters to push a car on the repair tracks in the shop. So

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much, however, of the reasoning of the court as we have quoted is applicable to the facts in this case.

In *Pittsburgh, etc., R. W. Co. v. Woodward, supra*, Judge GAVIN, in discussing the general rule, says: "Knowledge of the danger upon his part, or the existence of such facts as that by the exercise of reasonable diligence he might have known thereof, ordinarily constitutes an assumption of the risk. * * * Where the danger is open and obvious to either master or servant, it might doubtless be properly said that master and servant stand upon an equality. But even then the servant's assumption of the risk depends not upon the equality of his opportunities * * but upon the fact that by the exercise of reasonable care he ought to have known of the danger, and is therefore held to have known it."

The language of the court in *Gleason v. New York, etc., R. Co.* (Mass.), 34 N. E. Rep. 79, is applicable in this case: "The plaintiff's familiarity with the general condition of the premises can not be doubted, and the condition at this particular place, where he had been in the habit of working day after day, was open to view, and obvious. Under this state of things, no duty rested upon the defendant to alter the timbering or planking, and the plaintiff must be held to have taken the risk."

The rule that the master is bound to use ordinary care in furnishing the servant a reasonably safe place to work, is well settled, but where the danger is equally open and obvious to both the master and servant, and there is no promise to repair or remedy the defect, there is ordinarily no liability on the part of the master.

The theory of counsel for appellee, as indicated by the complaint and proceedings at the trial, appear to have been that the unsafe and dangerous condition of the stone was open and obvious; that this state of affairs had existed for several months prior to the accident, and that

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the danger could have been readily seen and discovered by appellant in the exercise of ordinary care.

It was not the duty of the decedent to make an examination or inspection to discover any latent or concealed defects or imperfections. He was only required to exercise ordinary care to avoid open and obvious dangers.

If there was any evidence, either direct or fairly inferential, tending to establish the fact that the proximate cause of the injury was a latent or concealed defect or imperfection which might on reasonable inspection have been discovered by appellant, the action might be sustained. All we decide now is that the cause of action alleged in the complaint has not been sustained by the evidence in the record.

In the case of *Blondin v. Oolite Quarry Co.*, *supra*, Blondin was employed by the company for the specific purpose of dressing stone and preparing the same for shipment after it had been quarried and placed in the stone yard "on a solid and steady surface secure and safe to work upon and about." Blondin had nothing to do with placing the stone in the yard. It was no part of his duty to bring or assist in bringing the stone to the yard or to take or assist in taking it away. In that case the company was in duty bound to place and keep the stone upon a safe and secure foundation. The stone which fell in that case had not been reached by the dressers. It was not the duty of Blondin to examine the stones about him to ascertain if they were all securely placed and free from danger of falling over while he was engaged in dressing other stone.

In this case, on the contrary, the specific work in which appellee's decedent was and had been engaged for four or five months was loading and unloading the stone, placing it in and taking it from the yard. It was a part of his duty, when stone was unloaded from a car into the

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yard, to see that it was securely placed. Whether he had assisted in unloading and placing this particular stone is not shown. It appears that the stone had been in the yard two or three months prior to the injury. Hobbs had been one of the hookers in the yard for four or five months. The stone had been in one and the same position all the time. It had been placed in that position by the use of the traveler, evidently when the hooks were attached to it at the time it was unloaded into the yard. The inference is legitimate, if not conclusive, that either said Hobbs or his associates placed it in the position it occupied.

In any event, as we read and understand the evidence in the record, it proves without contradiction beyond controversy that Hobbs had an equal, if not a better, opportunity of knowing the condition and situation of the stone than the appellant.

In the language of Judge COFFEY, in *Big Creek Stone Co. v. Wolf, supra*: "When the danger is equally known to both the master and servant there is no liability on the part of the master."

If he did not in fact have such knowledge, yet, in the language of Judge HACKNEY, in *Ames, Admr., v. Lake Shore, etc., R. W. Co., supra*: "If, from his service, he had opportunities, equal to those of the company, to know of the absence of the block, he must be held to have assumed the risk incident to the use of the switch without such block."

Judgment reversed, with instructions to grant appellant's motion for a new trial, with leave to amend complaint if desired, all at costs of appellee.

Filed Oct. 31, 1894.

Cole Brothers v. Wood.

No. 860.

COLE BROTHERS v. WOOD.

MASTER AND SERVANT.—Negligence.—Personal Injury of Servant.—Liability of Master.—Vice Principal.—Proximate Cause.—Unsafe Place to Work.—Pump Factory.—C. was the agent and foreman engaged in operating a factory of a corporation engaged in the manufacture of pumps, and, as such agent and foreman, he employed and kept the time of all employes therein, and assigned each employe the work he was required to do, directed what work and how it should be done, and designated the place where each employe should work. W., an employe, was directed by C. to take charge of, operate and manage a certain auger used for boring out wooden tubing for pumps. W. was directed by C. to set the wooden tubing on end, inclined to the north, and to rest the upper ends thereof against a framework overhead, made for the purpose, and located about eight feet north of the auger. While W. was engaged in the discharge of the duties of his employment, C. negligently and carelessly went in behind, and negligently and carelessly, at the same time, ordered E., another employe of the corporation, who was acting under the orders of C., to go in behind and on the north side of said tubing to perform some special service for the corporation, well knowing that W. was busily engaged at said auger, and without in any manner notifying W. of their presence, and in attempting to do the work so ordered by C., by reason of the limited space in which they were attempting to do the work, E. came in contact with the tubing, thereby causing three pieces, ten feet long, to fall upon the back of W. to his great injury, W. being unaware of their presence behind the tubing, and the space in which they were working being not to exceed two feet in width and not sufficient to perform work therein without endangering the safety of W.'s working place, all of which was well known to C.

Held, that C., at the time he gave the order and direction, and fixed the place in which he (C.) and E. should work, stood in the relation of master to W.

Held, also, that the corporation, through C., its agent, violated its duty in failing to keep W.'s working place reasonably safe, and that such violation of duty was the proximate cause of W.'s injury.

SAME.—Vice Principal.—Rule.—The master can not screen himself from responsibility by casting his duties upon another. The person upon whom such duties are laid, no matter what his rank or title may be, is, when he performs the duties of the master, a vice principal.

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SAME.—Vice Principal.—Fellow-Servant.—Combination of Both in Same Person.—The same individual may combine in his own person the functions of both master and servant, and when such person performs a servant's duty, no matter what his rank or title may be, he is, in the performance of such duty, only a fellow-servant with the others engaged in the same common business, for it is not a question of rank but of duty that must determine their relation.

SAME.—Respective Duties.—Assumed Risk.—For a summary of the duties which the master owes to his servant, and *vice versa*, and the duties which fellow-servants owe to each other, together with the hazards assumed in the employment, see opinion, page 48.

SAME.—Fellow-Servant.—Vice Principal.—Review of Indiana Cases.—For a review of the Indiana cases bearing on the fellow-servant and the vice principal rules, see opinion, page 50.

NEGLIGENCE.—Proximate and Efficient Cause.—If certain forces be set in operation which will naturally and probably lead to a certain result, the predominant cause, or the efficient or procuring cause, is the one first set in motion, and the intermediate causes are but attendant incidents which mark the course of the efficient cause.

SAME.—Injury.—Combination of Causes.—Liability.—If an injury happens while one's own wrongful act is in force and operation, he will not be permitted to escape liability because there was a more immediate cause of the injury, especially if that immediate cause was put in operation by his own wrongful act. To entitle such party from exemption he must show, not only that the injury *might* have happened, but that it *must* have happened, if the act complained of had not been done.

Dissenting opinion by Ross, J.

From the Putnam Circuit Court.

G. C. Moore and *M. A. Moore*, for appellant.

H. H. Mathias, *S. A. Hays*, *J. J. Smiley* and *W. G. Neff*, for appellee.

Lorz, J.—The appellant is a corporation organized under the laws of the State of Iowa, and engaged in manufacturing pumps and lightning rods. In the year 1890 it owned and operated a large factory situate in the city of Greencastle, Indiana, and appellee was employed by, and was working for, it in its said factory. While so engaged at work, he sustained severe personal injuries. He brought this action to recover damages,

alleging that such injuries resulted from the negligence of the appellant.

He stated his cause of action in two paragraphs of amended complaint. The appellant moved the court to require the appellee to make each paragraph more specific. This motion was overruled, and appellant then demurred separately to each paragraph. The demurrers were overruled, and appellant filed an answer in two paragraphs, the first being the general denial, and a demurrer was sustained to the second.

The cause was tried by a jury, which returned a special verdict. Appellant made a motion to require the jury to find specially certain additional facts. This motion being overruled, it then moved for judgment in its favor on the special verdict. This motion was overruled, and it then made a motion for a new trial. This last motion was also overruled, and the court then rendered judgment in favor of the appellee on the special verdict in the sum of \$3,000. Appellant excepted to each one of these adverse rulings, and has assigned each of them as error in this court.

That part of the first paragraph of the complaint necessary to be considered in determining the correctness of the ruling on the motion to make more specific and the ruling on demurrer, is as follows:

“That he (appellee) was employed to work for the defendant (appellant) by one Richard W. Crawley, who was then and there, and was at the time of the happening of the grievances hereinafter complained of, the *agent and the foreman* of said defendant in operating said factory; that as such agent and foreman the said Crawley *employed and kept the time of all the employes who worked in said factory, and assigned to each employe the work he was required to do, directed what work and how it should be done, and designated the place where each employe should*

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work; that the said agent and foreman had general supervision over all the employes of the defendant in said factory, and full authority to discharge such as he deemed it necessary to discharge; that the plaintiff, after being so employed as aforesaid, was directed by said agent and foreman to take charge of, operate and manage a certain auger, run by machinery, used in said factory, for boring out wooden tubing for pumps; that said auger and machinery thereto attached was located on the ground floor and against the south wall of a room on the south side of one of the factory buildings of the defendant; that after said wooden tubing was bored, the plaintiff was directed by said agent and foreman to set them on end inclined to the north and to rest the upper ends thereof against a framework overhead, made for the purpose, and located about eight feet north of said auger, in said room; that on said 29th day of July, 1890, while the plaintiff was engaged in the discharge of the duties of his employment in operating said auger and boring out said wooden tubing, the said agent and foreman negligently and carelessly went in behind, and negligently and carelessly, at the same time, ordered, directed and procured another employe of defendant, who was then and there acting under the orders and directions of said foreman, to go in behind and on the north side of a number of pieces of said wooden tubing which had been placed on end against said framework as aforesaid, well knowing that plaintiff was busily engaged at his work at said auger, and without in any manner notifying the plaintiff of their presence, to perform some special service for the defendant in no manner connected with or pertaining to the work of the plaintiff, the exact character of which is to this plaintiff unknown, and in attempting to do said work so ordered by said foreman, by reason of the limited space in which they were attempting to do said work, they came in contact with said pieces of

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wooden tubing, so placed on end as aforesaid, and thereby caused three of said pieces, each of which was four inches thick, four inches wide and ten feet long, to fall over upon and across the small of the back of the plaintiff, to his great injury; that at the time the said pieces of wooden tubing fell upon the plaintiff, as aforesaid, he was leaning over said auger as the nature of his work required him to do, with his back toward said pieces so set up as aforesaid, and was wholly ignorant of the fact that the said foreman and other employe were behind the same; that immediately north of the place where said pieces of wooden tubing were placed on end, as aforesaid, there was located certain machinery used by the defendant in said factory; that the space intervening between said machinery and said pieces of wooden tubing did not exceed two feet in width; that there was not sufficient room in said space to enable two persons to enter the same or perform work therein, without endangering the safety of employes or making the working place on the south side of said tubing unsafe, all of which was well known to said foreman, when he entered and directed said other employe to enter said space; that the said injury to the plaintiff was not caused by any fault or negligence on his part."

The second paragraph of the amended complaint is drawn upon the same theory as the first, and contains the same allegations with reference to the powers, duties and authority of Crawley, as agent and foreman of appellant, and gives the name of the employe who entered the space with Crawley as Jack Eller; that the said Eller, while performing said work, came in contact with said tubing and caused the same to fall.

The additional allegations which it contains, and which are important, are the following: "That for some time prior to the happening of the injury to the plaintiff, as aforesaid, the said Eller had been in the service of the

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defendant as an employe; that, as such employe, the said Eller had not been assigned any special work or place to work in said factory, but was employed at different kinds of work at different places in said factory from day to day, under the orders and directions of the said foreman, and had no working place in the vicinity of the plaintiff's said working place; that the said Eller was of careless and negligent habits, and did not exercise sufficient care and skill in the performance of the duties of his employment to make it probable that he would not cause injury to his coemployes; that by reason of the want of care and negligence of the said Eller, several of the employes of the defendant had been injured, of all which facts the defendant and the said foreman had full notice and knowledge of at the time of, and prior to, the injury to the plaintiff."

We have italicised parts of the first paragraphs above set out, for the purpose of calling special attention to them. It will be seen by an examination of the allegations, that Crawley had general supervision and control over all of the employes in the factory. He directed what work and how it should be done, and designated, the place where each employe should work. And it also appears that while the appellee was in the place, and engaged at the work assigned to him, Crawley, by his act and his command given to another employe, suddenly rendered appellee's working place unsafe and dangerous. Of this fact Crawley had full knowledge, and appellee had no knowledge. Appellee sustained injuries because of the unsafe condition of the place in which he was engaged at work. The act and command of Crawley are characterized as being negligent, and it is averred that the appellee was free from contributory fault. The theory of the complaint, as we construe it, is that the appellant failed in its duty to keep the appellee's

working place reasonably safe. If Crawley were the master, and he and an employe should have been engaged in placing dynamite bombs near appellee's working place without appellee's knowledge, and an explosion should have occurred, resulting in injury to the appellee, the hypothetical case and the actual case would be analogous.

The general rule is, that it is the duty of the master to provide his servant with a reasonably safe place in which to work. This duty is one imposed by law, and the master must respond in damages to his servant, who, without fault, sustains injury by reason of its violation. This duty is a continuing one, and rests upon the master at all times while the relation of master and servant exists. The cause of action sought to be charged in each paragraph of the complaint, is negligence. This negligence lies in the violation of the appellant's duty in failing to keep appellee's working place reasonably safe. The difficulty which arises in this case, is to determine the relation existing between Crawley and the appellee at the time of the injury. If they were fellow-servants, then the appellant is not liable, and the complaint is insufficient. If they stood in the relation of master and servant, then the appellant may be liable, provided the complaint is sufficient in other respects. In an action by a servant against the master for a violation of duty in failing to provide a safe working place, the complaint must aver that the master knew, or state such facts from which it appears that the master might have known by the exercise of reasonable care, that the place was unsafe. Where the master is charged with having done the negligent act with his own hand, and without the intervening agency of another, notice is involved in the act itself, and where such facts are averred they are equivalent to an allegation of notice.

In this complaint, however, we have the direct aver-

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ment "that there was not sufficient room in said space to enable two persons to enter the same or perform work therein without endangering the safety of employes, or making the *working place* on the south side of said tubing *unsafe, all of which was well known to said foreman* when he entered." If the foreman in entering such place was in the performance of a duty laid upon him by the master then his knowledge will be imputed to the master.

It is also essential to allege that the plaintiff did not have notice of the unsafe condition of the working place, or facts from which the want of such knowledge follows as a necessary inference. Here we have the general allegation of freedom from contributory negligence; this of itself is usually sufficient to negative notice; but it is not necessary to rely upon this principle or determine whether it applies to this action, for here we have the direct averment that Crawley and the other servant entered the narrow space "without in any manner notifying the plaintiff of their presence," and that at the time the tubing fell, plaintiff "was wholly ignorant of the fact that the said foreman and other employes were behind the same." It was the presence of Crawley and the other employe in the narrow space and their engaging at work therein that produced the hazard. It is true that such machinery was designed for use, and it may have been reasonably safe for one person to engage at work in the narrow space, but it is averred that two persons were required to and did engage at work in this limited space. The narrow space could not be occupied by the two persons at the same time and both engage at work therein without increasing the liability of displacing the tubing. The work these persons were ordered to do and were doing in said space was not the usual work required to be done there, but it is averred to have been a *special* service.

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The motion to make more specific was directed to each paragraph of the complaint, and sought to have each made more certain in substantially the same particulars. A complaint must proceed upon a single definite theory, and this theory must be determined from the general scope and character of its averments. To the theory so determined, the plaintiff must be held through all the different stages of the case, and upon it he must stand or fall. Appellant contends that several distinct theories are suggested by the complaint; that its motion to make more specific was designed to compel the appellee to disclose the theory upon which he claimed a right to recover. Judging the complaint by the general scope and tenor of its averments, we think it apparent that it proceeds upon the theory that the appellant is liable to the appellee for the failure of Crawley to discharge properly the master's duty laid upon him. Other theories may be suggested, but this is the controlling idea which pervades the whole pleading. The court has the right to construe the pleading and determine the theory most apparent and clearly outlined by the facts stated, and require the case to be tried upon that one theory. *Batman v. Snoddy*, 132 Ind. 480.

There is no available error in overruling the motion to make more specific. Having disposed of this preliminary question we proceed to consider the relation existing between Crawley and the appellee as made by the averments of the complaint.

Appellant contends with signal force and ability that neither paragraph of the complaint is sufficient to withstand its demurrer for want of facts. It is insisted that the cause of action made by each paragraph rests upon the acts and conduct of Crawley and the other employe, Eller, and that the facts averred show them to have been fellow-servants with the appellee at the time of the

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injury, and that, therefore, no liability arises as against the appellant. Appellee concedes that his right of action is based upon the conduct of Crawley, and that the allegations with reference to the other employe, Eller, are designed to show the aggravating negligence of Crawley's conduct in increasing the danger to appellee. He asserts that Crawley's position was that of vice principal, and that the appellant must respond for his negligent conduct.

In pleading negligence arising from the wrongful conduct of another, it is essential that the complaint shall contain (1) an allegation of duty owing by the defendant to the plaintiff, or facts and circumstances from which the duty can be inferred; (2) a failure in the performance, or an imperfect performance of such duty by the defendant; and (3) that such failure or breach of duty was the natural and proximate cause of the injury and damage to the plaintiff. The acts which caused the injury should be clearly and distinctly stated, but the pleader need not descend into unnecessary detail.

There is no proposition of law any better settled in this State than that the master, who has been careful in the employment of his servants, and has used diligence to keep them competent, is not liable to a servant who has been injured by the negligence of his fellow-servants. The rule itself is of easy comprehension, but its application to particular facts and circumstances often gives rise to many perplexities. The master can not screen himself from responsibility by casting his duties upon another. The person upon whom such duties are laid, no matter what his rank or title may be, whether superintendent, manager, agent, foreman or boss, is, when he performs the master's duty, a vice principal. In legal contemplation it is the same as if for the moment the master had appeared and performed the act. If the act

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be negligently done, and injury result, the master must respond in damages. The master's power over a given enterprise or industry is absolute. At his command it springs into existence or ceases to be. To govern, control and direct are the peculiar functions of the master. Any given enterprise is embraced within certain well defined limits. The master desires to accomplish certain results. To attain his ends he calls to his aid buildings, machinery, appliances, tools, and servants.

The position of a servant is that of a subordinate. He is subject to the will of his master. He works in such places and does those things which his master directs. The work of the master may be divided into departments, and the work of each department may be again subdivided and assigned to various servants. Each servant, in the performance of the work so assigned to him, must necessarily exercise a certain discretion in the manner of its performance. He is required to use care and skill. In the performance of such work, he is discharging the duties which he owes to his master. If he perform such work negligently and injury result to a person engaged in performing the same or similar work, the master is not answerable to the injured servant if the master was without fault. The same person may perform various parts of the servant's work. The master may also lay upon the same person a part or all of the master's duties and require of him that, while not performing the master's duty, he perform a servant's duty. The same individual may combine in his own person the functions of both master and servant. When such person performs a servant's duty, no matter what his rank or title may be, whether superintendent, manager, agent, foreman, or boss, he is, in the performance of such duty, deemed only a fellow-servant, with others engaged in the same common business. Rank, grade, or relative sta-

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tion, in most cases, throws but little light upon the inquiry as to whether two persons at a given time stood in the relative position toward each other of fellow-servants or of master and servant; for it is not a question of rank, but a question of duty that must determine their relation. A summary of the duties which the master owes to his servants, and the duties which the servants owe to their master, and the duties which fellow-servants owe to each other, together with the hazards assumed in the employment, may aid in determining the questions before us.

It is the duty of the master to provide his servants with safe working places; to provide for their use safe machinery, appliances, tools and implements; to provide safe materials with which to work; to provide careful and competent fellow-servants; to keep machinery, tools and implements in repair, and working places in safe condition; to take notice of the liability of machinery and appliances to wear out and become defective with age and use; to instruct the young and inexperienced servants as to their duties, and warn them of danger and how to avoid it; to regulate and so conduct his business that his servants may be the least exposed to danger, and to do nothing by which the danger to his servants may be unnecessarily augmented.

The servants may repose confidence in the prudence and caution of the master, and rest upon the presumption that he has discharged, or will discharge, all the duties which the law enjoins upon him.

It is the servant's duty to his master to be diligent and render him skill and care in performing the work assigned to him; to be careful and watchful of the master's property and interests, and to advise him of defects in machinery and appliances, and the negligence of fellow-servants, that come to his knowledge. It is a duty he owes to his fellow-servants that he perform the work as-

signed to him with care and prudence, so that by no default of his an injury befall them.

The law does not require unreasonable or impossible things of either the master or the servant. The master is not required to furnish buildings, machinery and appliances that are safe beyond peradventure; nor is he bound to provide the latest and most improved machinery and devices. When he has exercised reasonable care in providing places, machinery and appliances, and in the employment of his servants, and has exercised reasonable supervision to keep the places, machinery and appliances safe, and to see that his servants continue prudent and careful, his duties are done.

The servant assumes all the risks ordinarily incident to his employment. He is presumed to have contracted with reference to all such hazards, and to receive compensation commensurate with the dangers assumed. He is bound to take notice of such insecurity, defects and infirmities in places, machinery and appliances as are open and apparent; but he is not required to search for such infirmities. He is also bound to take notice of the unskillfulness and negligence of his fellow-servants that are open and apparent.

If he continues in the employment of the master after having knowledge of such conditions, ordinarily he assumes the attendant hazards. As a skillful servant may sometimes become unskillful, and a careful servant sometimes become negligent in the discharge of the duties assigned him, if injury result to a fellow-servant from such conduct the master is not liable. The risk of injury from the negligence of a fellow-servant under such circumstances, is one of the hazards assumed by the servant when he accepts employment.

The foregoing propositions are so well settled that we

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deem it unnecessary to cite authorities in support of them. It is true they are general rules to which there are many exceptions depending upon particular circumstances, but with the exceptions we are not here concerned.

Bearing these principles in mind we will endeavor to determine the relation existing between Crawley and the appellee at the time the injury was inflicted. If they were fellow-servants, then the appellant is not liable. If they occupied the relative positions of master and servant then the appellant is liable unless some other rule of law intervenes that precludes the right of recovery.

In this connection it is interesting to note the varying decisions of the Supreme Court of this State bearing upon this intricate question.

In *Gillenwater v. Madison, etc., R. R. Co.*, 5 Ind. 340, the plaintiff was a carpenter, and was employed by the defendant to frame and build a bridge on its road across Sugar Creek. While engaged in said work, the company directed him to proceed on its cars to Greenwood, and assist in loading timbers for the bridge. While thus on the cars, the defendant so carelessly managed the train that the cars were thrown from the track and down a bank, and permanently injured the plaintiff. It was held under these facts, that the plaintiff and the conductor and the engineer of the train were not fellow-servants, and that the company was liable.

In *Fitzpatrick v. New Albany, etc., R. R. Co.*, 7 Ind. 436, the plaintiff was employed by the defendant with other laborers to ballast a part of its road, by excavating gravel from certain gravel banks, loading it on the cars, and afterwards unloading and distributing it upon the road. The plaintiff boarded and lodged in Crawfordsville, two miles away from the gravel bank, and by agreement with the company he was regularly conveyed

to the town for his meals, and back again to the gravel pit. While being so conveyed on the gravel car to the pit, to engage in his work, the train, by the negligence of the engineer, ran into, and came into collision with a passenger train on the same road, and plaintiff sustained injuries. It was held that the plaintiff and the engineer were not fellow-servants.

In *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366, a set of hands, among whom was the deceased, Tindall, were at work graveling a portion of the defendant's track. The gravel was carried from the pit to the place where it was used upon the road by means of a train of gravel cars. The same hands loaded and unloaded the cars, and rode back and forth to the places of loading and unloading upon them. While thus employed, the train, through the negligence of the engineer, ran against an ox and was thrown off the track, and Tindall was instantly killed. Upon these facts the court held the deceased and the engineer to be fellow-servants.

In *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226, the facts were substantially as follows: At the southern terminus of the railroad the company's cars, machinery, and other property were kept, and at said place there were divers tracks and switches for the accommodation of freight cars, and at said place the company, as was its custom, coupled and uncoupled freight cars. The plaintiff was employed by the defendant and stationed at said place. His duties were various, such as working on the track, hauling and unloading gravel, and also to assist in coupling and uncoupling cars when ordered to do so, but was not connected with any train as a business. In attempting to uncouple a freight car he was injured by the negligence of those in charge of the train. He was held to be a fellow-servant with the engineer and conductor.

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In *Slattery's Admr. v. Toledo, etc., R. W. Co.*, 23 Ind. 81, it was decided that a brakeman on a train, and one whose duty it was to attend a switch, were fellow-servants.

In *Chicago, etc., R. W. Co., v. Harney*, 28 Ind. 28, the averments of the complaint were that the plaintiff's minor son was employed under a special contract to work on defendant's road as a track hand. The defendant's roadmaster, in charge of a construction train, ordered and compelled the track hand to assist in distributing ties from said train, and in so doing he was injured by the negligence of the roadmaster. It was held that the company was liable, but the decision seems to rest upon the compulsion averred. An extreme view of this subject was reached in *Columbus, etc., R. W. Co. v. Arnold, Admr.*, 31 Ind. 174.

The facts of that case, briefly stated, are, that one Losee was in the employ of the railroad company as master machinist for the western division of the road and occupied that position at the city of Indianapolis. As such he had the immediate control, direction and supervision of the engines and other machinery and of the repairs to the same, and of the engineers and firemen on the engines on that division of the road. He selected the engine, engineer and fireman for each particular service or train, and ordered them accordingly. He was a skillful and experienced master machinist and entirely competent to the proper performance of the duties required of him. By his direction one Lederer was put in charge of an engine as engineer and, with one Scott as fireman, in running an express passenger train between Indianapolis and Columbus, Ohio; while so engaged the boiler of the engine exploded when in the State of Ohio and caused the death of Scott. The administrator of Scott's estate brought suit against the company for damages.

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In the course of the opinion the court, by ELLIOTT, C. J., said: "The board of directors of a railroad company are its immediate representatives, and occupy the relation of master to the various employes engaged in operating the road and superintending and performing the business of the company in its various departments. * * * The directors of such a corporation, from the very nature of the organization and the business in which it is engaged, are not expected personally to superintend the various operations of the road. * * * It is the duty of such a corporation to use every reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, including properly constructed engines, and the necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates to supervise, inspect, repair, and regulate the machinery, and to regulate and control the operations of the road. If these duties are performed with care and diligence by the directors, and one of the persons so employed is guilty of negligence by which an injury occurs to another [servant], it is not the negligence of the directors, or master, and the company is not responsible."

The effect of this holding is, that the master's liability ceases when he selects a competent and careful subordinate and charges him with the execution of the master's duties. This case has been often followed by that court. *Sullivan v. Toledo, etc., R. W. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Robertson v. Terre Haute, etc., R. R. Co.*, 78 Ind. 77; *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282; *Indianapolis, etc., R. W. Co. v. Johnson*, 102 Ind. 352; *Capper v. Louisville, etc., R. W. Co.*, 103 Ind. 305; *Cincinnati, etc., R. R. Co. v. McMullen, Admr.*, 117 Ind. 439; *Ohio, etc., R. R. Co. v. Hamersley*, 28 Ind. 371.

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The doctrine announced in *Columbus, etc., R. W. Co. v. Arnold, Admr., supra*, reached its utmost extreme in *Robertson v. Terre Haute, etc., R. R. Co., supra*. It appears from the facts of that case that a brakeman on a train *en route* was injured by collision with another moving train moving in an opposite direction. The collision was the result of the negligence of the train dispatcher whose duty it was to control the movement of trains. It was held that although the brakeman and train dispatcher were many miles apart at the time of the injury, and though their duties were distinct, they were nevertheless fellow-servants, and the master was not liable. The more recent decisions have a tendency to relax this extreme view.

The force of the holding in *Columbus, etc., R. W. Co. v. Arnold, Admr., supra*, was very much weakened by the case of *Indiana Car Co. v. Parker*, 100 Ind. 181, and in *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124, it is practically overthrown.

The facts of the latter case, as averred in the complaint, were that the plaintiff, Taylor, was a machinist in the employ of the company, engaged in work in its shop under the control of its master-mechanic. The master-mechanic had entire control of the shop and employes therein, and of all work, and had authority to select and change machinery. The company desired to inspect the head of an equalizer on one of its locomotives for the purposes of ascertaining whether the key could be changed, and its master-mechanic ordered the plaintiff to disconnect the equalizer and remove it from its place, so that the master-mechanic might examine it. While engaged in removing the key under such direction the equalizer was negligently pulled out of its place by the master-mechanic, and fell upon the plaintiff and very severely injured him. In a well consid-

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ered discussion of the principles involved, the court held that at the time the plaintiff was injured the master-mechanic was performing the master's duty, and was not merely a fellow-servant; and that the company was liable for his negligence.

In *Nall, Admr., v. Louisville, etc., R. W. Co.*, 129 Ind. 260, it was averred that a heavy freshet caused a large accumulation of drift wood and other *debris* against one of the company's bridges which spanned a creek, and endangered the safety of the bridge to such an extent that it was deemed necessary to call out a large force of men to save it from destruction; that the company entrusted to one Helms the sole and absolute supervision over and direction of work of saving the bridge; that under such authority the said Helms ordered and directed the deceased, Nall, who was a track hand or section hand on said road, to go down off the railroad track into the stream and among the drift-wood and engage with others in the work of saving the bridge; that while so engaged the said Helm, as such representative, carelessly and wantonly commanded and caused one of the locomotive engines of the defendant to be suddenly started up and accelerated in speed, while the said Nall was down among the drift-wood, and the ropes thereto attached; that one of such ropes, being thus suddenly pulled and jerked, slipped from its place, and with great violence struck the said Nall and instantly killed him. On these facts it was held that the superintendent, Helms, and the deceased, Nall, were not fellow-servants; that the master's duty to his servants to provide safe places for them to work is a continuing one, and requires him to use ordinary care to keep them safe, and if they become unsafe through his neglect, or are made unsafe through his act, he must answer in damages to the servant injured thereby, who is without fault.

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The case of *Columbus, etc., R. W. Co. v. Arnold, Admr., supra*, is expressly discredited, and *Taylor v. Evansville, etc., R. R. Co., supra*, followed.

In *Justice v. Pennsylvania Co.*, 130 Ind. 321, the complaint averred in substance that the plaintiff Justice was in the employ of the defendant company as a section hand; that with a gang of four other men he was engaged in the repair of the company's track; that one McCleary was the foreman of such gang, with full power to employ and discharge section hands; that it was the duty of said foreman to direct the plaintiff, and the men with whom he worked, how, when, and where to work, and to direct and control the manner of using the various tools, implements, and other means used to perform said work, and had the absolute control and supervision of the use and movements of a certain hand car used by said gang in the prosecution of the work; that on said day, after their work was completed, the said gang, including the plaintiff and McCleary, got upon such hand car for the purpose of returning the same to the place where they were usually kept, when another gang, consisting of seven section men placed another hand car upon the track, and started after the one on which the plaintiff was situate; that each of said cars was propelled by hand power, applied by means of two levers, which levers rested upon an upright, projecting about two or three feet above the floor of the car. The second car was the larger one, and capable of being propelled twice as fast as the one on which the plaintiff was situated; that the second car ran up to, and against the first, and caused it to greatly increase its speed, and caused the levers to work up and down with great rapidity so that it became, and was, difficult for the plaintiff to maintain his hold thereon, and that by reason of the small space on the platform of the car, it was dangerous

for the plaintiff to let go of the lever, that being his only means by which he could maintain his position on the car; that said McCleary knew that the rapid motion of said levers was dangerous to those upon said car, and that it was difficult for the appellant to retain his hold thereon, and so knowing *carelessly and negligently failed to apply the brake and check the speed of the car*, though said brake was convenient to him, and not convenient to the plaintiff; that by reason of the rapid speed of the car, and the motion of the levers thereon, the hold of plaintiff became loosened, and said lever struck him, whereby he was greatly injured; that said McCleary carelessly permitted said other car to butt up against the car upon which the plaintiff was traveling, without any objection thereto, and permitted the gang thereon to propel and push ahead the first car at a very rapid rate of speed, and permitted the same to continue without raising any objection thereto or applying the brake until said accident occurred. We make this extended reference to this case for the reason that appellant's counsel rely confidently upon it as being decisive of the case in hearing.

We do not think that case controlling, nor do we think it is in conflict with any of the previous decisions. There was nothing to show that the foreman, McCleary, had any power or authority over the men on the second car. The case proceeds upon the theory that McCleary failed to apply the brake and check the car. This was an act that any one upon the car might have done. There is no charge that McCleary gave any command or direction, or failed to give any in relation thereto. If he had applied the brake, it would have been an act similar in kind to working the lever. If he applied it, but in a negligent manner and injury had resulted, it would clearly have been the act of a fellow-servant. His fail-

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ure to act at all could not be dignified into a failure to perform the master's duty. That decision is correct in principle and sustained by abundant authority.

In a still more recent case, *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, the allegations of the complaint were that the appellant was employed to do general work in and about the appellee's coke yards, and to haul away ashes and other refuse, haul slack and clean the yards; that he was inexperienced in working with machinery as defendant well knew; that one Gus Lawrence was defendant's agent to employ and discharge its workmen, including the plaintiff, and to control their work; that said Lawrence negligently directed the plaintiff to clean certain of defendant's slack elevators, and the place of performing such work was dangerous in that it became necessary to stand close to the machinery of the elevators and upon the buckets thereof, and that if the machinery was put in motion while he was so occupied injury was sure to follow, of which dangers said defendant well knew; that plaintiff entered upon the work so assigned in the presence and under the direction of said Lawrence, and reposed confidence in the prudence and caution of the defendant, and that the defendant would notify him of the starting of the machinery so that he could remove from its danger; that while so engaged, and without notice or warning, the defendant negligently put the machinery in motion, whereby plaintiff, without fault or negligence on his part, was drawn into the guide of the elevator belt and buckets and sustained the injuries complained of. Under these averments it was held that the plaintiff and the foreman, Lawrence, were fellow-servants, and that the master was not liable for the injury.

It is hard to reconcile the last decision with the cases of *Taylor v. Evansville, etc., R. R. Co., supra*, and *Nall, Admr., v. Louisville, etc., R. W. Co., supra*, on principle. but the

facts of each case are widely different. It is difficult to formulate a rule that will govern all cases of a given class. The particular facts and circumstances of each case must control its decision, for neither the law nor the principles of the law exist abstractly or independently of the facts. The end to be attained is justice, and to do justice is to render to every one his due. If one who is blameless has sustained an injury by fault or offense of another, he should have a remedy.

In the case at bar, it was the master's duty to provide the appellee with a reasonably safe place in which to work; this duty was a continuing one, and required the appellant to keep it reasonably safe at all times. If the master, in performing one duty, violate another, he must answer for the consequences. Certain duties of the master were laid upon Crawley. He was given power to order and direct what work and how it should be done, and to designate the place where each employe should work. Under this authority he had the right to determine the place and the manner in which he himself should perform the servant's duty which he owed to the master. It is charged that he, Crawley, ordered and directed another employe to enter a certain place and do work therein, and that he also entered such place for such purpose. In doing these things he was performing the master's duty, and in that respect he was not a fellow-servant with the appellee. The execution of the master's orders in conjunction with the manual acts of Crawley and Eller, rendered the place in which appellee was working dangerous, and injury actually befell him. Here was a violation of the master's duty which the appellant owed to appellee, to keep the place in which he worked reasonably safe.

It is true there is no averment which, in terms, charges that appellee's working place was rendered

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dangerous or unsafe. Specific allegations are usually better than general statements. The complaint specifically sets out the facts which rendered the working place unsafe, and it further appears that appellee actually sustained injury while in such place. The place where injury actually occurs is usually an unsafe place.

This case is distinguishable from *New Pittsburgh, etc., Co. v. Peterson, supra*, for there the servant knowingly accepted a place of danger; he had the highest incentives, his personal safety, to put him on his guard and to ward off danger. The acts that increased his peril were starting the machinery, coupled with the failure to give him warning. Both of these, the starting of the machinery and the failure to warn, are such acts as usually and naturally devolve upon a fellow-servant. In this case, however, the appellee was in his accustomed place at work. It was ordinarily a safe place. There was nothing whatever to apprise him of insecurity or warn him of danger. By the combination of the master's act and the acts of the master's servants, he was suddenly and unexpectedly placed in great peril and received serious injury. In the first case there were some extenuating circumstances; here there are none.

Appellant further contends that the complaint is bad because it does not appear that Crawley was the sole person who stood in the master's place. This contention is not well founded. The master can not shield himself from liability by dividing his duties and laying them upon various subordinates. The test is not whether all the master's duties have been delegated, but whether any of them have been conferred.

We have reached the conclusion that at the time Crawley gave the order and direction and fixed the place in which he and Eller should work, he stood in the relation of master to the appellee. But it does not fol-

low from this relation simply that the appellant is liable. It must further appear that the injury which the appellee sustained was the proximate result of some conduct of the master. The immediate cause of the injury was the falling of the pieces of tubing on appellee's back; such fall was caused by the persons at work in the narrow space coming in contact with them; the cause of the persons being engaged at work in that place was the order and disposition of Crawley. All of these things taken together rendered the place in which appellee was at work dangerous; and the master violated his duty in failing to keep appellee's working place reasonably safe.

A cause is that which produces an effect. We have here the result and the cause or causes which produced it. Every result is attended with an infinite number of preceding causes. The law is a practical science. It does not undertake to draw the wide distinctions of natural philosophy. The injury can usually be traced back to the immediate cause without much difficulty. The immediate cause is usually the result of so many divergent influences and facts that it would be futile to attempt to follow them. Hence, has sprung the rule, "*in jure causa proxima non remota spectatur*,"—in law the near cause and not the remote is considered." Here, too, like in the first question considered in this case, the difficulty arises in the application of the rule. Any cause to which legal responsibility is attached must have its origin in some responsible human agency. If certain forces be set in operation which will naturally and probably lead to a certain result, the predominant cause, or the efficient or procuring cause, is the one first set in motion, and the intermediate causes are but attendant incidents which mark the course of the efficient cause. In such instances the intermediate and incidental causes are not the proximate causes in a legal

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sense. The law reaches back and passes by the intermediate causes and denominates the controlling cause, the proximate cause.

If, after the forces which have their origin in the efficient cause have been once set in motion, some other responsible agency or cause intervenes, which is of itself capable of producing the injury, then the course of the antecedent cause, is arrested, the chain of causation broken, and the intervening cause becomes the proximate cause. Where two or more independent causes concur in producing an injury, and it can not be determined which is the efficient or controlling cause, or whether without their concurrence the injury would have happened at all, and a particular party is responsible for the consequences of one cause only, a recovery can not be had, because it can not be determined that the injury would have resulted without such concurrence. But the law will not permit a wrongdoer to apportion, qualify or take advantage of his own wrong, and if an injury actually happened whilst his own wrongful act was in force and operation he ought not to be permitted to escape liability because there was a more immediate cause of the injury, especially if that immediate cause was put in operation by his own wrongful act. To entitle such party to exemption he must show not only that the same injury *might* have happened, but that it *must* have happened, if the act complained of had not been done. The case at bar falls within the rule last announced. Here a duty rested upon the appellant to keep the place in which appellee was working reasonably safe. The appellant required certain of its servants to engage at a special work in a narrow place, in close proximity to the wooden tubing, and that such servants should come in contact with such tubing was natural and probable. It is within the range of probability that the injury might have hap-

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pened without the command and direction of the appellant in requiring its servants to work in the narrow place; but this is not enough, it should appear that the injury *must* have occurred if the act complained of had not been done.

In *Lane v. Atlantic Works*, 111 Mass. 136, it was said that "the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effects of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen.

"The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (171); *Terre Haute, etc., R. R. Co. v. Buck, Admx.*, 96 Ind. 346 (353); *City of Crawfordsville v. Smith*, 79 Ind. 308; *Henry v. Dennis*, 93 Ind. 452; *Binford v. Johnston*, 82 Ind. 426; *Dunlap v. Wagner*, 85 Ind. 529; *Rogers v. Leyden*, 127 Ind. 50; *Davis v. Garrett*, 6 Bing. 716; *Cooley Torts*, 76, n.; *Harriman v. Pittsburgh, etc., R. R. Co.*, 12 N. E. Rep. 451; *Louisville, etc., R. W. Co. v. Davis*, 7 Ind. App. 222; *Howe v. Ohmart*, 7 Ind. App. 32.

We think it clear that the appellant violated its duty in failing to keep the appellee's working place reasonably safe, and that the violation of this duty is the proximate cause of the injury. In reaching this conclusion, we do not overlook the fact that there may be gradations

and differences in rank between the various servants of one common master. But as above stated, it is not a question of rank or grade but a question of duty that determines the relative position between them. It is true that this opinion is based upon the relative position existing between Crawley and the appellee at a stated time, but we hold that Crawley was a vice-principal, and appellant must respond for the negligent acts done by him while so acting. The court did not err in overruling the demurrer.

The special verdict finds every fact necessary to entitle the appellee to a recovery. There is no available error in the subsequent rulings of the court.

As this opinion has already been extended to an inordinate length we must decline to consider them in detail.

Judgment affirmed at costs of appellant.

Filed Mar. 29, 1894; petition for a rehearing overruled Nov. 15, 1894.

DISSENTING OPINION.

Ross, J.—The material question presented by the record in this case is whether or not the appellants are answerable to the appellee for an injury received by him while in their employ resulting from the negligence of a coemployee.

It appears to the writer that the opinion adopted by the majority, while announcing many well settled legal principles, is plainly a deviation therefrom.

The theory of the complaint under consideration is, as the majority opinion states, to recover for an injury sustained by reason of the appellant's making appellee's working place unsafe. Upon this theory is its sufficiency considered by the court, and upon the same theory will I give my views as to its sufficiency.

It is conceded, by the facts alleged in the complaint, that the appellee was employed to work in a factory in

which there were other persons and several machines employed, the work specially assigned to appellee being to operate an auger and bore holes in the tubing, which he afterwards piled on end, inclined from him, on a frame near his machine; that back of this frame, where he piled the tubing, stood another machine used by appellants in the operation of their business, but between which and the piled tubing the place for the person operating the machine was so narrow that he was liable to strike the tubing and cause it to fall over on the appellee; that when no one was operating that machine or in the space between it and the tubing, there was comparatively no danger of the tubing falling on appellee. At the time appellee was injured, the appellant's foreman ordered another of appellant's servants to go into this space between the tubing and the machine to do some work, the foreman accompanying him, and that they, on account of the limited space, came in contact with the pieces of tubing so placed on end, causing it to fall, etc.

In the opinion of the majority, it is said: "It is charged that he (Crawley, appellant's foreman) ordered and directed another employe to enter a certain place and do work therein, and that he also entered such place for such purpose. In doing these things he was performing the master's duty, and in that respect he was not a fellow-servant with the employe. The execution of the master's order, in conjunction with the manual acts of Crawley and Eller, rendered the place in which appellee was working dangerous, and injury actually befell him. Here was a violation of the master's duty which he owed to appellee, to keep the place in which he worked reasonably safe."

And again: "We have reached the conclusion that at the time Crawley gave the order and direction and fixed

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the place in which he and Eller should work, he stood in the relation of master to the appellee."

And, also, "The immediate cause of the injury was the falling of the pieces of tubing on appellee's back; such fall was caused by the persons at work in the narrow space coming in contact with them; the cause of the persons being engaged at work in that place was the order and disposition of Crawley. All of these things, taken together, rendered the place in which appellee was at work dangerous, and the master violated his duty in failing to keep appellee's working place reasonably safe."

The vital question to be determined from the facts alleged in the complaint are whether or not Crawley (appellant's foreman) was, at the time complained of, a vice-principal or a fellow-servant with the appellee, and whether he violated any duty owing from the appellant to the appellee.

"All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow-servants in a common employment." Beach Cont. Neg., section 332.

"All who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who take the risk of each other's negligence." Thompson's Neg., 1026, section 31.

Judge COOLEY states that "persons are fellow-servants when they engage in the same common pursuit under the same general control." Cooley on Torts, p. 541, note 1.

These general definitions are not sufficiently clear that they may be applied to every state of facts, and the relative position of the parties determined. While all engaged in a common service, strictly speaking, may be fellow-servants, yet the master may delegate one with power and authority for the performance of duties which rest solely upon the master, and when so clothed and while in the performance and to the extent of such duties the servant acts instead of the master. A foreman or superintendent is *prima facie* a fellow-servant with those under him, and it is not sufficient simply to charge him with being such foreman or superintendent with power to hire and discharge those under him and to direct the manner of carrying on the master's work, to make him a vice-principal, but the facts alleged must show that he was in the discharge of a duty owing from the master to the servants. *Flynn v. Salem*, 134 Mass. 351.

A vice-principal is one whom the master has clothed with power to act in his stead in the performance of a duty owing from the master to his servant. And for all his acts or omissions in respect of the matters in which he acts in place of the master in performing the master's duty, the master is liable. Simply because one servant is superior in grade, rank or authority, does not make him any more the representative of the master than those lower in position. It is not grade or position that determines whether a servant is acting for and instead of the master, but the duty he is performing.

"The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters, and not fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single

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master are engaged in a common service, and are fellow-servants, and some other line of demarkation than that of control must exist to destroy the relation of fellow-servants." *Baltimore, etc., R. W. Co. v. Baugh*, (U. S.) 54 Am. and Eng. R. R. Cases, 328.

In this case the Supreme Court of the United States have announced the correct principle, namely, that the master's liability for an injury to one servant caused by the negligence of another servant is not to be determined from the grade or authority of the negligent servant, but rather by what duty of the master, the performance of which had been delegated to the negligent servant, was neglected, resulting in injury. *New Pittsburgh Coal and Coke Co. v. Peterson*, 136 Ind. 398.

In the case of *Justice v. Pennsylvania Co.*, 130 Ind. 321, the same principles were announced by our Supreme Court, COFFEY, J., speaking for the court, saying: "If, at the time the offending servant performed the act by which another servant was injured, he was in the performance of a duty which the master owed to his servants, he was not a fellow-servant, for the rule is fundamental that the master can not rid himself of the duty he owes to his servants by delegating his authority to another, and if he attempts to do so, the person to whom he delegates the power to act is a vice-principal, and not a fellow-servant. * * * On the other hand, if at the time of the alleged negligence the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow-servant with others engaged in the same common business, and the master will not be liable for any injury inflicted upon such fellow-servant by reason of his negligence."

This is the general rule followed by all courts with

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few exceptions. That there are occasional deviations in the application of the rule I am free to admit, but the rule itself stands unchanged.

My associate who wrote the prevailing opinion in the final summing up seems to have entirely overlooked this rule, and while not directly renouncing it in fact, as appears from the conclusion reached, he bases his opinion upon the relative position of the parties.

In the first paragraph of the complaint it is alleged that Crawley, "the said agent and foreman, negligently and carelessly went in behind and negligently and carelessly, at the same time, ordered, directed and procured another employe of defendant to go in behind and on the north side" of said pieces of tubing and to perform some special work, and in attempting to perform the work came in contact with the tubing. Applying the test to the facts alleged, what duty did the appellants neglect? Did they agree that the other machinery in their factory should remain idle or that none of their servants should work in the immediate vicinity of the appellee while he was working? Did appellants guarantee the appellee from all risk of injury resulting from the acts of their other servants while in the performance of their duties in operating the other machinery? The fallacy of such an assumption is apparent. In what particular then can it be said the appellants were negligent? Were the appellants negligent in ordering the other servant to go behind the tubing to perform this special work? Unless it can be said that the appellants agreed with the appellee that they would not put any person to work there they were not negligent in ordering a servant to go there to work.

Was Crawley negligent in going behind the tubing? In going behind the tubing he went for the purpose of assisting in the performance of a duty owing from him

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as a servant to his master, hence he was not acting in the place of the master, but was acting as a servant of the appellants.

Was Crawley negligent in going behind the tubing to do this special work for the appellant? If that was the place where the work was to be performed, and Crawley was to do it or assist in its being done, he had a right to go there for that purpose and in so doing was nothing more than a servant of the appellants.

It is not alleged in the complaint either that appellants were not in the habit of using this space in the manner and for the purpose alleged, or that the appellee was ignorant of its use. The presumption is that he knew it was so used and that he understood the nature and hazard of his employment, when it was so used, at the time he engaged in appellants' service. It devolved upon the appellee by his allegations to show such a state of facts as would warrant the court in holding that the risk was not one naturally incident to the service. If he knew of the danger, and the presumption is that he had such knowledge unless specially denied, it was an incident to his service and he assumed it. The allegation in the complaint that he had no knowledge that Crawley and Eller were behind the tubing does not rebut the presumption that he knew that the machine back of the tubing was used and that persons operating it were compelled to go behind the tubing for that purpose. The legal presumptions are that the appellee either knew these facts when he entered appellants' employ and contracted with reference thereto, or that he afterwards acquired such knowledge and by continuing in their employ assumed the risk. Negligence is never presumed, hence it was necessary for the appellee to allege and prove such a state of facts as would show the appellants to have been remiss in the performance of some duty

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owing from them to him. The negligence of the appellants, if any is charged, was not in the manner in which they directed their servants to do this special work, but in doing the work at all. The pleading does not pretend to proceed upon the theory that the appellants ordered their servants to do the work in an unusual or improper manner, but that it was negligence to order them to do it at all, because in its execution the safety of the appellee was endangered. Had the facts alleged shown that in the performance of this work by appellants' servants the appellee was exposed to an unknown danger, the case would be a very different one, but such is not this case. In order to make the complaint good, it was necessary for the appellee to have alleged want of knowledge on his part, of the danger. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Indianapolis, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427; *Matchett v. Cincinnati, etc., R. W. Co.*, 132 Ind. 334; *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156; *Pennsylvania Co. v. Congdon*, 134 Ind. 226.

It is not alleged that the appellants knew or that the appellee did not know that it was dangerous for persons to work behind the tubing when piled up in the manner alleged. The allegation in the complaint is that Crawley, the foreman, and Eller, the workman, were behind the tubing unknown to the appellee. Such an allegation will not take the place of an averment that the appellee had no knowledge of the dangerous condition of the working place. If the appellee accepted service knowing the position and condition of the machinery and working place, he assumed all apparent risks. That he did know of the apparent risks, and contracted accordingly, the law presumes.

"Knowledge on the part of the employer, and ignorance on the part of the employe, are of the essence of the

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action; or, in other words, the master must be at fault and know it, and the servant must be free from fault, and ignorant of his master's fault, if the action is to lie." Beach Cont. Neg. (ed. 1885), p. 350, section 123; *Ohio, etc., R. W. Co. v. Heaton*, 137 Ind. 1.

Unless these facts are alleged in the complaint it is insufficient on demurrer.

Once again we recur to the theory of the complaint, and inquire, what duty did the appellants violate? Did they furnish appellee with an unsafe working place? No, because it is not alleged that it was unsafe. Neither is it alleged that the appellants knew it was unsafe, or that the appellee did not know that it was unsafe.

It is evident, therefore, that we are not mistaken in our conclusion as to the theory of the complaint, and as already stated, upon that theory it does not state a cause of action. To the writer it seems clear that the opinion adopted by the majority is in direct conflict with the last expressions of the Supreme Court as contained in the many cases cited in the majority, and this dissenting opinion.

The judgment ought to be reversed, with instructions to sustain the demurrer to each paragraph of the complaint.

Filed March 29, 1894.

No. 934.

THE PHENIX INSURANCE COMPANY v. ROGERS ET AL.

RES ADJUDICATA.—*Reversal on Appeal, with an Order for New Trial.—Dismissal.—Refiling Complaint.—When May Be Tested by Demurrer.*—Where, after the reversal of a case by the Supreme Court, with an order granting a new trial, the same was placed upon the docket of the trial court, and was subsequently dismissed by the plaintiffs, but the complaint was, subsequently to the dismissal, refiled, the complaint, after being refiled, may be tested by demurrer where it

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was not so tested in the original action, and where the complaint is not set out in full in the report of the former case, so that it may be determined whether it is the same as the one refiled. In such case the principle of *res adjudicata* does not apply.

INSURANCE.—Notice of Loss.—Policy Requiring Notice Forthwith.—Notice in Reasonable Time Sufficient.—If an insurance policy provide that notice of loss or damage shall be given in writing to the company forthwith, contrary to the statute providing that any such condition shall be void, all that can be required of the insured is that he give notice of loss within a reasonable time.

SAME.—Notice, when Given within Reasonable Time.—Where the complaint alleges that plaintiffs gave notice within — days after the loss, and as soon as they discovered the same, sufficiently shows the giving of notice within a reasonable time, when construed in connection with the general averment that plaintiffs had performed all the conditions on their part to be performed, except as stated in the complaint, no other exception being mentioned with reference to the giving of notice.

SAME.—Proof of Loss.—Waiver.—Where, upon due notice of loss, the insurance company notified the insured that it would not pay the insurance, nor any part thereof, for the reason that the property was vacant when the fire occurred, proof of loss was waived.

SAME.—Reformation of Policy.—Necessary Averments.—Complaint.—In a bill to reform an insurance policy, without an averment that it was the purpose or intention of both parties that an old condition in the policy should be erased or done away with and a new one inserted in its place, or words of such import, no mutual mistake is shown, and the mere averment of the conclusion that the omission to make the change was by the mutual mistake of the parties, will not cure the defect. The bill must show that the contract, as written, was not what both parties to it intended it should be, and it must point out the mistake, and show that it was mutual, and that it was a mistake of fact and not of law.

PLEADING.—Complaint.—Theory of.—Can Not be Aided by Reply.—A complaint must proceed upon a definite theory, and recovery had, if at all, upon that theory, and a reply can not be looked to to bolster up the complaint.

SAME.—Condition Against Premises Remaining Unoccupied.—Recovery.—Waiver.—If there is a condition in the policy against the insured premises remaining unoccupied, and the uncontradicted evidence is that the premises were unoccupied at the time of the loss, it defeats the insured's right to recover, where there was no waiver of the condition.

From the Decatur Circuit Court.

The Phenix Insurance Company v. Rogers *et al.*

E. F. McCabe, for appellant.

J. S. Scobey and *J. D. Miller*, for appellees.

REINHARD, J.—This cause was originally appealed to the Supreme Court. That court, on the 27th day of March, 1893, determined that the jurisdiction of the appeal was in the Appellate Court, and by an order of that date transferred the cause to our docket.

The action is on a fire insurance policy for the alleged loss of a dwelling house. The first error assigned and discussed is that of the overruling of the appellant's demurrer to the complaint. After averring the execution and delivery of the policy and the loss, the complaint proceeds as follows:

"The plaintiffs, on their part and behalf, performed any and all and singular the conditions and stipulations thereof on their part to be done and performed respecting said contract, except as hereinafter stated; that within — days thereafter, and as soon as known to plaintiffs that said dwelling house had burned and was destroyed by fire, they at once, in writing, notified said defendant, said insurance company, thereof; that upon receipt of said notice by said defendant, she caused a pretended inquiry to be made of the premises, and afterwards, on the 26th day of December, 1885, notified the plaintiffs that she, the defendant, would not pay said sum of seven hundred dollars, by her written upon said dwelling house in said policy, or any part thereof; that plaintiffs did not make any proof of said loss for the reason that said defendant waived the same by denying liability because of vacancy at time of loss. * * *

Plaintiffs further allege that on and prior to said application of plaintiffs to said defendant for said insurance herein mentioned, said defendant had made and promulgated the following rule and condition of insurance

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by defendant as to, and in respect of, property by her insured becoming vacant, to wit: 'Our rule is not to permit vacancy over thirty (30) days at one time,' instead of and in lieu of the printed condition in said policy, to wit: 'Or if the above mentioned buildings become vacant or unoccupied' — 'this policy shall be null and void.' And the plaintiffs further allege that at and before the making of said application for said insurance they had full knowledge of said alteration and change in the condition in said printed policy as to vacancy aforesaid, and that said application for said insurance was made, and the consideration therefor paid upon the faith of said condition in said policy as to vacancy of insured property being as above stated, to wit: 'Our rule is not to permit vacancy over thirty (30) days at any one time'; that by the mutual mistake of the parties said printed condition in said policy, as to vacancy, was left to stand as printed therein, when the same should have been erased, and said condition, to wit, 'Our rule is not to permit vacancy over thirty (30) days at one time,' inserted in lieu thereof." Prayer for judgment on the policy and a reformation.

The policy is copied into the complaint in full. It is urged by appellant's counsel that the complaint is insufficient for three reasons:

1. It fails to show that notice of the loss was given within the time required or within a reasonable time.
2. It fails to show a waiver of the proof of loss.
3. It fails to state facts sufficient to entitle the appellee to a reformation of the policy.

The appellee's counsel contend that the question of the sufficiency of the complaint is *res adjudicata*, and in support of this contention we are referred to the case of *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, the claim being that this is but a continuation of that case. The

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opinion in that case was filed, as appears from the statement at the close of the same, on January 16, 1890, and a petition for a rehearing overruled March 20, 1890, while the complaint in the present case was filed November 7, 1890. It is claimed, however, by appellee's counsel that after the reversal of the former judgment by the Supreme Court, and the replacing of the cause upon the docket of the trial court, the appellees entered a dismissal, but that the complaint was subsequently refiled, and that no change or amendment was made to the complaint. It must be admitted that where a rule of law has been declared by the appellate tribunal, such rule will be adhered to not only in all subsequent stages of the same cause of action, but also in any subsequent action between the same parties on the same cause of action, even though such rule be of doubtful correctness. *Hawley, Admr., v. Smith, Admr.*, 45 Ind. 183.

But there are two reasons why the doctrine of former adjudication can not apply to the case in judgment. In the first place, the complaint is not set out in full in the report of the former case, and we can not, therefore, know whether it is the same as the one in the case at bar. In the next place, the complaint in the other action was not tested by demurrer, and the Supreme Court might have come to a very different conclusion had a demurrer been filed and overruled. Many defects in a pleading will be cured by the verdict or finding, if objection is not made until after such verdict or finding, while the same defects would render the pleading bad on demurrer.

"The availability of objections in a case where a demurrer is interposed in due time and in an appropriate form, assumes a very different phase from the one it wears where the objections are made by a motion in ar-

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rest or by a specification in the assignment of errors." Elliott's App. Proced., section 681.

It becomes our duty, therefore, to pass upon the sufficiency of the complaint, as tested by the demurrer. Is it subject to any or all of the objections urged to it? We shall consider these objections in the order in which they are presented and hereinbefore stated.

The policy provides that "in case of loss or damage, the assured shall forthwith give notice of such loss in writing to the company."

It is not averred in the complaint how many days elapsed after the fire before notice of loss was given in writing. The averment is "that within — days thereafter, and as soon as known to the plaintiffs that said dwelling house had burned," etc., the notice was given. If exact time is an essential averment, it is manifest that the pleading is totally insufficient. Usually, however, indefiniteness in a pleading can only be reached by motion to make more specific, and not by demurrer. But we think if it appears that the notice was given within a reasonable time, it will be a sufficient averment.

It is provided by statute that insurance companies shall not insert in their policies any condition requiring the insured to give notice forthwith, or within the period of less than five days, of the loss of the insured property, and any such condition is void. But if such a condition is nevertheless inserted, the most that can be required by the insurer of the insured is that he shall give notice of the loss within a reasonable time. R. S. 1894, section 4923 (R. S. 1881, section 370); *Pickel v. Phenix Ins. Co.*, 119 Ind. 291; *Insurance Co. of North America v. Brim*, 111 Ind. 281; *Baker v. German Fire Ins. Co.*, 124 Ind. 490; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361.

Does the complaint show that the notice was given

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within a reasonable time? It is averred that the notice was given as soon as the appellees discovered the loss. We need not decide what would be the consequence if an insured party who had sustained a loss were to remain negligently ignorant of such loss for a long time, and in consequence thereof fail to give the notice. No such case is here presented. We think the averment that appellees gave the notice within — days after the loss, and as soon as they had discovered the same, must be construed in connection with the general averment that appellees had performed all the conditions on their part to be performed except as stated in the complaint, no other exception being mentioned with reference to the giving of notice. When thus construed, we think the complaint sufficiently shows the giving of the notice within a reasonable time. *Germania Fire Ins. Co. v. Deckard, supra.*

We also think the waiver of proof of loss is sufficiently pleaded. There is no provision in the policy as to how such proof of loss shall be made. As we have held, the appellees, within a reasonable time after the loss, notified the appellant of the same. The complaint alleges that on the 26th day of December, 1885, the company notified the appellees that it would not pay the insurance, or any part thereof, for the reason that the property was vacant when the fire occurred. The property was burned on the 21st day of November, 1885. When the company refused to pay on the ground of a violation of the vacancy provision in the policy, proof of loss would have been unavailing, if made after such refusal, in any event. *Bowlus v. Phenix Ins. Co., 133 Ind. 106.*

The appellees were not chargeable with unreasonable delay in failing to make the proof of loss prior to the time of the refusal. What we have said concerning the question of notice, is, in many respects, applicable here.

We proceed to consider the last objection urged to the

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complaint: Do the facts alleged show that the appellees were entitled to a reformation of the policy? That instrument provides, in the body thereof, among other things, that if the buildings become vacant or unoccupied, without consent indorsed on the policy, the latter shall be null and void. If, therefore, upon the trial of the cause, the evidence should disclose that the buildings were vacant or unoccupied, at the time of the fire, the appellees could not recover. To overcome this difficulty, the appellees undertook to aver facts which would avoid the force and effect of the vacancy clause in the policy. The theory adopted by the appellees is that, by agreement of the parties, the provision in the policy regarding a vacancy of the premises was done away with, and permission was granted the appellees to let the buildings become vacant for a period of thirty days at a time, without special consent of the company. The pleader undertakes to aver that this permission was, by agreement, to be inserted in the body of the contract, but was, by the mutual mistake of the parties, omitted therefrom, and a reformation is prayed for. The controlling question, therefore, is whether the mutual mistake is so pleaded as to authorize such reformation.

It will be seen, by referring to the complaint, that it is not averred that it was intended by the parties that the stipulation: "Our rule is not to permit vacancy over thirty days at one time," should be inserted in lieu of the condition regarding vacancy which was contained in the policy.

The tenor and effect of the averment is:

1. That before the policy was issued the company had promulgated the general rule above quoted, with reference to vacancies.

2. That appellees had full knowledge and notice of the promulgation of such rule and the change in the

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condition of the company's policies, and that the application was made and consideration paid upon the faith of such new rule.

3. That by the mutual mistake of the parties the printed stipulation in the policy was left to remain in the same when it should have been erased and the new rule inserted in lieu thereof.

Now, we can well see that it may have been quite true that the new rule was made and promulgated by the company, and that the appellees had full knowledge of the same, when they applied for the insurance, and yet it may not have been intended by both parties to the insurance that the new rule should constitute a part and parcel of the contract of insurance.

Without an averment that it was the purpose or intention of both parties that the old condition in the policy should be erased or done away with and the new one inserted in its place, or words of such import, no mutual mistake is shown, and the mere averment of the conclusion that the omission to make the change was by the mutual mistake of the parties, will not cure the defect. The bill must show that the contract, as written, was not what both parties to it intended it should be, and it must point out what the mistake was, and that it was a mistake of fact, and not of law, and that it was the mistake of both parties, and not of one merely. *Wood v. Deutchman*, 75 Ind. 148; *Nelson v. Davis*, 40 Ind. 366; *Baldwin v. Kerlin*, 46 Ind. 426; *Allen v. Anderson*, 44 Ind. 395; *Heavenridge v. Mondy*, 49 Ind. 434; *Schoonover v. Dougherty*, 65 Ind. 463; *Dowell v. Caffron*, 68 Ind. 196; *Toops v. Snyder*, 70 Ind. 554; *Easter v. Severin*, 78 Ind. 540; *First Nat'l Bank, etc., v. Gough*, 61 Ind. 147.

The rule is correctly stated in *Nevins v. Dunlap*, 33 N. Y. 676, and approved by our Supreme Court in *Baldwin v. Kerlin*, *supra*, as follows:

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“To entitle a party to the decree of a court of equity, reforming a written instrument, he must show, first, a plain mistake, clearly made out by satisfactory proofs. * * * In the second place, he must show that the material stipulation which he claims should be omitted or inserted in the instrument, was omitted or inserted contrary to the intention of both parties, and under a mutual mistake.”

And in *Nelson v. Davis*, *supra*, the court say: “But there is, if possible, a still more fatal defect in the answer. It is not alleged that anything was omitted in the deed that was directed to be inserted, or that anything was inserted, by mistake or otherwise, contrary to the direction of the parties.”

Three things are necessary in a bill to reform a written instrument. It must appear:

1. That there was a mutual mistake.
2. The agreement actually made; and,
3. That which the parties intended to make. 20 Am. and Eng. Encyc. of Law, p. 720, and cases cited.

The instrument is sought to be reformed in a material respect. If the contract was as stated in the policy, a vacancy without permission indorsed would render the policy void during such vacancy. The parties had a right to make such a contract, and the courts can not relieve either of them from its consequences. If it was their intention to make another contract respecting the vacancy, the pleader should have averred that fact. This, as we have shown, is not done. Unless it was the intention of both parties to engraft the new rule upon the contract, and expunge the old one therefrom, the appellees can not have a reformation.

The presumption must continue in favor of the contract as signed by the parties until the contrary appears

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by express averment in the bill to reform. The highest considerations of public policy forbid that a party should be relieved from the performance of his own agreement, deliberately made.

It is a rule as old as our jurisprudence, that a written contract can not be varied or modified by a contemporaneous verbal one. If a party to a written contract could escape its consequences by simply asserting a mutual mistake, without showing the particulars of such mistake, and that the contract made was in fact not the one intended to be made, the rule as to verbal modifications could be evaded and set at naught in every doubtful case by simply asking for a reformation. Such an innovation upon well settled and wholesome principles would be fraught with the direst consequences, and we have neither the power nor the inclination to make it. The contract that a vacancy without consent will avoid the policy, was one which the company had a clear right to make to protect itself against the increased hazard which the vacancy of the premises would entail. There is no claim that the appellant, by endorsement on the policy or otherwise, ever gave its consent that the buildings might remain unoccupied for any length of time. "Policies of insurance, like all other contracts, are to be construed with reference to the intention of the parties, to be ascertained from the terms and conditions placed therein." *Continental Ins. Co. etc., v. Kyle*, 124 Ind. 132.

It is contended, however, that no reformation of the policy was necessary. There is no averment in the complaint, and nothing is disclosed therein which shows that the premises were unoccupied when the fire occurred. We are, therefore, of opinion that the general allegation of the performance of all conditions, etc., renders the complaint sufficient, and the demurrer was correctly

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overruled. The pleading is a good complaint as a declaration upon the policy, although not sufficient as a complaint to reform the policy.

The appellant answered in three paragraphs. The first is the general denial, the second avers that the buildings were vacant and unoccupied at the time of the loss, contrary to the provisions of the policy, and the third sets up a limitation clause in the policy according to which no suit or action shall be sustainable on the policy unless brought within six months after the loss, and avers that such loss occurred more than three years before the commencement of the action. Separate demurrers were filed to the second and third paragraphs of the answer. The demurrer to the second paragraph was overruled, and the demurrer to the third paragraph was sustained. These paragraphs were the same as those ruled upon in *Rogers v. Phenix Ins. Co. supra*, and, according to the ruling in that case, the second paragraph states a good defense.

It was alleged by way of reply to the second paragraph of the answer "that at the time of the negotiation of said contract of insurance between said parties, said defendant well knew that said property insured then was, and would continue to be property owned and used by plaintiffs for rental purposes only, and would, and was at any time liable to become vacant by the removal of a tenant therefrom without the knowledge of said plaintiffs; that said plaintiffs refused to take insurance upon said property in said defendant's insurance company in a policy of insurance having the conditions therein that said policy should become null and void, should said insured property become vacant; that thereupon the agent through whom said policy was issued produced, and showed plaintiffs the book of rules issued by said defendant prior to that time,

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in which is set forth the rule of said defendant as to insured property becoming vacant as follows: 'Remember our rule is not to permit vacancy over thirty days at any one time, and when this vacancy becomes chronic we do not want the risk at all;' that thereupon it was agreed between said parties that upon the terms of this last named rule, as to vacancy, said plaintiffs would take said insurance on said property and pay the premium therefor, and that said defendant would and did accept said application for said insurance and issue and deliver to plaintiffs said policy upon said last-named terms and rule as to any vacancy thereof, and upon the faith of said term, as to vacancy, said plaintiffs paid defendant their premium money therefor; that by the mutual mistake of said parties said condition as to vacancy in the printed form of said policy issued to plaintiffs was omitted to be stricken out and said rule and condition above herein set forth omitted to be inserted therein in lieu of said condition printed therein and agreed, as aforesaid, to be stricken therefrom. Plaintiffs pray the court to reform said contract of insurance," etc.

A demurrer was filed to this reply, but the record fails to disclose that any ruling was made upon the demurrer. We can not, therefore, consider the assignment that the court erred in overruling the demurrer to the reply.

The overruling of the motion for a new trial is the last specification of error. Three reasons are assigned in the motion for a new trial:

1. That the finding of the court is contrary to law.
2. That the finding of the court is contrary to the evidence.
3. That the finding of the court is not supported by sufficient evidence.

A reformation of an instrument declared upon can not

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be decreed, unless the plaintiff is entitled to such relief by reason of the allegations in his complaint. The rule that a complaint must proceed upon a definite theory and that a recovery can be had only according to the averments of the complaint, applies with special force when there is in the complaint no averment whatever entitling the plaintiff to the relief obtained. The reply can not be looked to to bolster up the complaint, even if it were a good pleading. The complaint is the foundation of the action and upon it alone the plaintiff must recover or not at all. If the evidence is not applicable to the complaint, a finding in favor of the plaintiff upon such evidence is contrary to law. "A motion for a new trial on the ground that the verdict or decision is contrary to law is in the nature of a demurrer to the evidence. It admits all the evidence given upon the trial, but says that, as the verdict or decision based upon such evidence is contrary to the general principles of the law, applicable to the issues involved, judgment shall not be rendered thereon. Such a motion presents to the *nisi prius* and appellate courts a question of law merely." Buskirk's Pr., p. 239. Our Supreme Court defines a verdict which is contrary to law to be one which is contrary to the principles of law as applied to the facts which the jury were called upon to try, contrary to the principles of law which should govern the case. *Bosseker v. Cramer*, 18 Ind. 44. And in a later case the same court said: "We think, in the meaning of the code, that a verdict which is improperly affected by any error of law occurring at the trial is a verdict contrary to law." *Robinson Machine Works v. Chandler*, 56 Ind. 575 (583).

We also think the verdict is not sustained by sufficient evidence. Enough is disclosed by the evidence to lead to the conclusion that there can be no recovery without a reformation of the policy. It is shown that the fire

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occurred while the premises were vacant, and this was a clear violation of the plain provisions of the contract of insurance. No evidence tending to prove a mutual mistake of facts and entitling the appellees to have the policy reformed could be considered, as there was no complaint upon which to base such evidence properly. The mere fact that the company agreed to issue the policy on the rule promulgated by it, and that the appellees accepted the insurance and paid the premiums upon the faith of such an agreement, is not sufficient to entitle appellees to recover on the policy. Even if the complaint is good as an action to reform the policy under the holdings of the Supreme Court in *Rogers v. Phenix Ins. Co.*, *supra*, as contended, the evidence fails to support it.

There is nothing in the complaint, or even in the reply, which excludes the necessity of the company's consent indorsed on the policy, in case of a vacancy.

As the Supreme Court said in that case: "The fair construction of the stipulation in the policy and the rule, if the rule entered into the policy as contended, we think is that the company will permit a vacancy for the period of thirty days, provided its consent is indorsed on the policy." *Rogers v. Phenix Ins. Co.*, *supra*.

There is not a scintilla of evidence that consent, in writing or otherwise, was ever given by the company that the dwelling might remain unoccupied for any time. On the other hand, the evidence is uncontradicted that the premises were unoccupied at the time of the loss. If this was true, it defeated the appellee's right to recover the insurance.

The learned counsel for the appellees contend that it was not necessary, in order to entitle the appellees to recover, that the policy should be reformed, and in support of this contention they cite the case of *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266.

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We have examined that case, but do not think it in point. There may be cases, doubtless, in which a company may waive some of the conditions of a policy, and in such cases the waiver may be relied upon by the insured, without a reformation of the policy. It has never been decided in this State (or in any other, so far as we are aware) that a recovery may be had on a policy containing such a provision as to vacancy as the contract before us contains, when it is shown that the provision was violated in that there was an actual vacancy of the property when it was burned, unless a reformation is first had so as to show that the vacancy clause was done away with by the contract of the parties.

Other questions are presented, but it is not necessary to further prolong this opinion by considering them.

The court erred, we think, in overruling the motion for a new trial.

Judgment reversed.

GAVIN, J., having been of counsel below, took no part in the decision of this case.

Filed Nov. 16, 1894.

DISSENTING OPINION.

DAVIS, J.—I am not prepared to agree with the majority of the court on the question of pleading in this case. It appears, in the principal opinion, that the complaint shows that after the loss occurred, appellant denied liability on the ground that the buildings were vacant at the time of the fire. In my judgment the averments in relation to the mutual mistake of the parties as to the terms and conditions which entered into the policy in reference to the vacancy of the buildings, were sufficient to authorize the reformation of the contract, if necessary.

The fact, if true, that the buildings were vacant and

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unoccupied at the time of the loss, was a matter of defense.

In the language of Judge Ross, in a recent decision: "It was not necessary for the plaintiff to anticipate, in his complaint, the defenses which the defendant might avail itself of in its answers, but, if he could plead matters which would avoid such defenses, they were proper in the form of a reply." *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266.

Whether such defense is based on a stipulation in the policy or application, the rule, in my opinion, is the same, so far as the question of pleading is concerned.

Neither do I concur in the conclusion that if the rule, as set out in the reply, under the circumstances therein alleged, entered into the contract, was without effect, unless the consent of the company to the vacancy for thirty days or less was indorsed on the policy. If the evidence fairly tends to prove the facts and circumstances alleged in the reply, this, in my judgment, was sufficient on this branch of the case.

In other words, the theory of the appellee, as disclosed by the complaint, and also the reply, is that it was mutually understood and agreed by the parties that the stipulation in the policy in relation to the vacancy of the buildings without the consent of the company indorsed thereon, should be stricken out, and the new rule referred to, allowing such vacancy for thirty days without the consent of the company indorsed thereon, should be inserted in the policy in lieu of such stipulation. If, by mutual mistake, this change was not made, the vacancy of the buildings for less than thirty days without consent of the company indorsed on the policy did not defeat appellees, right to recover.

In the complaint, as it stood when decided by the Supreme Court on the former appeal, the theory seems to

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have been that the new rule and the stipulation in the printed policy, or a part of it, both entered into the contract, and should be construed together.

Filed Nov. 16, 1894.

No. 1,137.

WILSON ET AL. v. THE WESTERN FRUIT COMPANY.

SALE.—*Goods Damaged and Rendered Worthless in Transit.*—*Failure to Return.*—*Bananas.*—Where A ordered a car load of bananas of B, and B shipped them in a common box car instead of a refrigerator car, as was usual and customary, and in course of transit they were frozen and rendered worthless, A lost no rights by its failure to return them, since they were of no value.

SAME.—*Duty of Vendor in Preparing for Shipment.*—*Bananas.*—It was the duty of B, in delivering the goods for shipment, to use reasonable diligence and care that the bananas were safely packed in proper manner to insure a safe carriage, and the risk of B's negligence in this regard was not imposed upon A by mere delivery of the goods to the carrier.

INSTRUCTION TO JURY.—*Refusal.*—*Without Foundation in Fact.*—*Harmless Error.*—The refusal of an instruction relative to the issues was harmless error, if error at all, where an integral fact upon which the instruction was based is shown by the answers to interrogatories to be without foundation in fact.

SAME.—*Given.*—*When not Prejudicial Error.*—A party will not be heard to complain of instructions which, in view of the finding and judgment, could not have injured him.

From the Allen Superior Court.

J. B. Harper, for appellants.

P. A. Randall and *N. D. Doughman*, for appellee.

GAVIN, J.—The appellants sued appellee upon an accepted draft. The appellee set up by way of answer that the sole consideration for the acceptance was a car load of bananas ordered by it from appellants by telegraph,

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to be shipped from New Orleans, where appellants lived, to Fort Wayne, where appellee did business in November, 1892; that appellants negligently, and carelessly packed the fruit in a common box car instead of in a refrigerator car, as was usual and customary, whereby they became frozen in transit, and were rendered worthless, without any fault upon appellee's part, which facts were unknown to appellee at the time of the acceptance. It is further set forth that the contract was for goods worth more than \$50, and was therefore unenforceable.

The appellants filed a reply which is substantially a specific denial of the answer, in which they assert that the fruit was shipped upon telegraphic orders setting them out, which constituted a valid and enforceable contract, was placed in a refrigerator car, duly consigned to appellee at Fort Wayne, Indiana, and was therefore delivered to appellee at New Orleans on board the car, and was thereafter at its risk.

The trial by a jury resulted in a general verdict for defendant, the appellee, together with various answers to numerous interrogatories.

Appellants claim first, that they were entitled to judgment on the answers to interrogatories, notwithstanding the general verdict; second, that their motion for new trial should have been sustained.

In discussing the first assignment of error, counsel argue that the only issue presented by the answer is the statute of frauds. With this contention we do not agree. On the contrary, the answer, as we view it, puts in issue the negligence of appellant in carelessly packing the fruit in a common box car instead of in a refrigerator car. It is evident also that the court upon the trial so construed it.

The counsel for appellants says: "The jury find that all the essential elements of a contract in writing exist

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in the telegrams; that the goods were sent in conformity to the order accepting appellants' offer; that appellee received them; that appellants mailed to appellee a bill of lading for said car about the time of shipment; that the draft or bill of exchange sued on was accepted by appellee in settlement for said bananas; that the same was for \$407, and that it is due and unpaid, and that the appellee kept and disposed of the car load of bananas. It seems that all the essential facts are found to entitle appellants to a judgment." It may be conceded without deciding that this construction of the answers to interrogatories is correct, and if there was no issue as to appellants negligence, the result claimed by counsel would then follow.

There is, however, nothing in the above that would overthrow in any degree the general verdict in favor of the defendant upon the question of negligence. On the other hand the answers to interrogatories, when all are examined, show conclusively that the general verdict was based upon appellants' negligence.

The following interrogatories and answers bear upon this proposition:

"7th. Were said bananas not delivered on board a refrigerator car on the 5th day of November, 1892, in good condition, properly consigned to the defendants at Fort Wayne, Ind.? Answer. No.

"8th. Did not said car load of bananas arrive at Fort Wayne, Ind., properly consigned to the defendant, on the 10th day of November, 1892, in a refrigerator car? Answer. No.

"21st. Did not said plaintiffs exercise proper care by shipping said bananas in a refrigerator car? Answer. No."

In response to interrogatories propounded by appellants they further found:

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"2. Was not the car load of bananas for which the said draft was drawn chilled and frozen by the cold and rendered worthless while in transit from New Orleans to Fort Wayne? Answer. Yes.

"3. Was not the said car load of bananas shipped in a common car, such as used in summer time, and not packed or protected in any way from the cold? Answer. Yes.

"4. Could not the plaintiffs, by properly packing and protecting said bananas from the cold, and shipping them in a refrigerator car, have prevented them from being frozen or chilled? Answer. Yes."

It is further found that appellees did not know, and could not have learned, of the condition of the bananas at the time they took them from the car, nor did they know their condition when they accepted the draft.

Since the goods were of no value whatever, appellee lost no rights by its failure to return them. *Higham v. Harris*, 108 Ind. 246; *Citizens' Bank v. Leonhart*, 126 Ind. 206; *Baldwin v. Marsh*, 6 Ind. App. 533; *Regensburg v. Notestine*, 2 Ind. App. 97.

There was no error in overruling appellants' motion for judgment.

By the motion for new trial, the rulings upon instructions and the sufficiency of the evidence are presented.

Instruction No. 1, asked by appellants, was to the effect that if there was a valid contract for the purchase of the bananas to be shipped to appellee by rail, and appellants, in pursuance thereof, delivered them on board a car at New Orleans, consigned to appellee at Fort Wayne, Ind., this completed the sale, and they were then subject to its (defendant's) "risk on account of loss or damage from any cause."

We can not concur in this statement of the law. In our judgment it was the duty of appellants, in any event,

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when delivering the goods for shipment by a common carrier, to use reasonable diligence and care to see that the goods were safely packed in proper manner to insure a safe carriage, and the risks of appellants' negligence in this regard were not imposed upon appellee by the mere delivery of the goods to the carrier.

Counsel seem to claim, in argument, as in this instruction, that all that was required of appellants was to deliver the goods to the carrier. In support of this position he relies upon the language of the court in *Bartlett v. Jewett*, 98 Ind. 206, wherein it is said: "As a general rule, the delivery to the carrier is a full discharge of the duties of the seller." Also, "The obligation imposed upon a seller by the contract of sale is, at most, to place the goods in the hands of the carrier, receive and transmit a proper bill of lading."

The language there used must be construed with reference to the case in hand, which involved simply the duty of the vendor to insure the goods in transit and furnish information concerning the same.

If a vendor is to ship a set of dishes to his vendee, it requires no argument to establish that his duty would not be performed by putting them in a box without any packing to prevent breakage, and then deliver them to a carrier.

In *Benj. on Sales* (4th Am. ed., Corbin), section 528, the law is thus declared: "The delivery to the carrier must be with ordinary care, to secure safe carriage and delivery to the buyer."

In *Tiedeman on Sales*, section 95, it is said: "But in making delivery to a common carrier, the vendor must take every precaution to insure a safe delivery to the buyer."

Both authority and the plainest principles of jus-

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tice and fair business dealing require that the vendor should do more than deliver the articles to the carrier.

It was held, as early as *Clarke v. Hutchins*, 14 East, 475, that it was the duty of the vendor to take the usual and ordinary precautions to insure the goods a safe conveyance.

The second instruction asked proceeds upon the hypothesis that the goods were shipped in a refrigerator car and directs the jury as to the law in that event among others.

By the answers to interrogatories, the jury found that the goods were not thus shipped. Since an integral fact upon which the instruction was based is thus shown to have been without foundation in fact, no harm could have resulted to appellant from the refusal.

We think counsel in error in construing the third instruction given to exclude all other questions than the one there referred to. The court evidently simply deals with one fact in the case and its result, leaving the effect of the other controverted facts to be determined by the jury, aided by other instructions.

Several instructions to which objection is urged relate to the validity and binding force of the alleged contract of purchase and sale. We do not regard it as necessary for us to enter into a consideration of these questions, for the reason that, as claimed by counsel for appellant, the jury evidently and plainly found against appellee upon that proposition. This being true, appellants could not, by any possibility, have been injured by the instructions on that subject, even if erroneous, because it is clear that the jury was not misled thereby. *Woolery, Admr., v. Louisville, etc., R. W. Co.*, 107 Ind. 381; *Elliott's App. Proced.*, section 642, p. 571.

The objection presented to the fifth instruction is not

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tenable, since, as we have already held, no return is necessary where the goods are of no value.

We find no harmful error in the instructions given by the court of its own volition, when considered in the light of the verdict of the jury. Counsel claim that they purport to cover all the phases of the case and to sum up all the evidence, but fail to do so. After a careful examination we do not understand them to purport to cover all phases of the case or to attempt to sum up the evidence. This objection is, therefore, not well taken.

While an examination of the evidence indicates that the decided preponderance is with the appellants, still there is evidence, either direct or circumstantial, which fairly sustains the verdict upon the theory of appellants' negligence in packing and shipping the goods in the manner in which it was done.

Judgment affirmed.

Filed Nov. 15, 1894.

No. 1,376.

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HARMLESS ERROR.—Misconduct of Counsel.—Argument to Jury.—Evidence.—Criminal Law.—Where the prosecuting attorney, over objection of the defendant, in his argument to the jury, read the birth entry from the family Bible, which was identified by the mother of the prosecuting witness, while on the witness stand, as the entry she had made, and testified that it was a true entry, but which was not read in evidence, the conduct of the prosecutor, if erroneous, was harmless, because the fact as to the age of the prosecuting witness was uncontroverted.

From the Marshall Circuit Court.

E. C. Martindale, for appellant.

A. G. Smith, Attorney-General, and A. J. Beveridge, for State.

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DAVIS, J.—This was a conviction upon an affidavit for selling intoxicating liquor to a minor on the 18th of April, 1893.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. Two questions only have been discussed:

1. Misconduct of the prosecuting attorney during his argument.

2. Insufficiency of the evidence to support the verdict.

We have carefully read the evidence. It is conflicting. There is some evidence at least tending to support the judgment of the trial court on every issue involved in the case. We can not, therefore, under the rule that prevails in this court, disturb the verdict of the jury on the evidence.

On the trial the mother of the prosecuting witness testified that he was born on the 16th of November, 1872. On cross-examination she testified that the memorandum she had at the trial, as to the date of his birth, had been copied by her from the family Bible on that morning. She also agreed, at request of counsel for appellant, to produce the Bible in court during the trial.

The family Bible referred to was afterwards produced by her when she was again on the stand as a witness, and in the course of her testimony her attention was called to an entry therein of the birth of the prosecuting witness, which she testified she made soon after he was born. The record farther recites that "during the argument of the case to the jury the State's attorney read from the family record of the Ault family, to which defendant objected, which was overruled by the court, and defendant at the time excepted."

The mother, without objection, testified to the date of the birth of her son, as shown by the entry made by her in the family Bible, also produced the bible in court and

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in her testimony identified the entry. It is stated by counsel for appellant that the prosecutor read this entry to the jury in the course of his argument. Counsel urge that this was error because the record does not show that the entry was read in evidence. In the first place the fact that the prosecuting witness was born on the 16th of November, 1872, does not appear to have been questioned. Appellant admitted making the sale of intoxicating liquor to him in April, 1893, but claimed that the prosecuting witness then said to him that he was twenty-one years of age, and that he had the appearance of being about that age. Evidence was also introduced tending to prove that he had said to others that he was twenty-one years of age. On these points the evidence was conflicting. That the prosecuting witness was in fact a minor was not controverted, except by the statements alleged to have been made by himself that he was of age. The most favorable construction of the evidence in behalf of appellant would be that he acted in good faith in reliance on the said alleged representation of the minor that he was of full age.

Under the circumstances disclosed by the record we are not able to see in what respect the act of the prosecuting attorney in reading this entry from the family Bible, in his argument, was prejudicial to appellant. In this view of the case it is not necessary to consider whether the objection made by appellant and the reason assigned in the motion for a new trial properly present the question sought to be raised.

We find no reversible error in the record.

Judgment affirmed.

Filed Nov. 1, 1894.

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McCormack v. Showalter et al.

No. 1,256.

McCORMACK v. SHOWALTER ET AL.

DAMAGES.—*Excessive.*—*General Verdict for \$500.*—*Special Finding \$400.*—*Judgment for \$400.*—*Trespass.*—Where the theory of a complaint is to recover damages for trespass, and the jury assessed plaintiff's damages at \$500, but in answer to an interrogatory the jury found that the property destroyed was of the value of \$400, the general verdict was excessive in the sum of \$100, and the action of the court in rendering judgment for only \$400 was not erroneous.

From the Henry Circuit Court.

J. Lockridge, J. Brown and W. A. Brown, for appellant.

M. E. Forkner, J. M. Brown and L. P. Mitchell, for appellees.

Ross, J.—The appellant, Mellin McCormack, sued the appellees, Ashbury Showalter, Charles Newby, John T. Herrel, David Craig, Benton Hinshaw, Jehu Craig, John W. Souder, John Oliphant, Joe Newby, Abe Larue, Frank A. Martindale and John Minnick, to recover damages for trespass in the destruction of a building owned by him, by blowing it up with dynamite.

There was a trial by jury, and a verdict in favor of appellant, assessing his damages at five hundred dollars.

With their general verdict the jury returned answers to a number of interrogatories which had been submitted to them at the request of the appellees. By the record, it appears that the court, in rendering judgment, allowed the appellant four hundred dollars damages instead of five hundred dollars, the amount assessed by the jury in their general verdict. The only contention of appellant is that the court erred in refusing to render judgment in

his favor on the general verdict for five hundred dollars.

The theory of the complaint is to recover damages for trespass. In actions of this character, the damages which are recoverable are simply compensatory. *Gebhart v. Burkett*, 57 Ind. 378.

Under the allegations of appellant's complaint, no other damages could be assessed, and they must be limited to the property destroyed or injured.

In answer to interrogatory number twenty-nine, the jury found that the property destroyed was of the value of four hundred dollars. That being the extent of the injury sustained, the general verdict was excessive in the sum of one hundred dollars. The jury, in all probability, added this extra one hundred dollars as punitive damages. To this extent the answers to interrogatories overcame the general verdict.

The counsel for appellees have devoted a great part of their brief to the discussion of questions not properly before us, inasmuch as they arise, if at all, under an assignment of cross-errors. The records of this cause in this court fail to show that cross-errors were ever assigned or filed by the appellees, and the paper upon which the supposed assignment of cross-errors is written does not bear the file mark of the clerk of this court.

Under the rules of this court the appellees had sixty days after the submission of the cause within which to have assigned cross-errors, but having failed to do so could not afterwards make such assignment without leave of court. Rule 4 of rules of Appellate Court.

Judgment affirmed.

Filed Nov. 23, 1894.

Stewart, Administrator, v. Small et al.

No. 1,870.

STEWART, ADMINISTRATOR, v. SMALL ET AL.

DECEDENT'S ESTATE.—Claim, Sufficiency of.—A claim against a decedent's estate, of the following tenor: "Estate of Robert Stewart, deceased. In account with James M. Small and Laura E. Small, wife of said James M. Small, Dr. For board, washing, sewing, nursing and expense of last sickness, watching with and caring for deceased from November 1, 1888, to September 29, 1893. Total of 256 weeks, \$2,125," is sufficient.

PARENT AND CHILD.—When Services Not Gratuitous.—Presumption.—A promise by a parent to give to a child land in consideration of board, nursing, care and attention is sufficient to rebut the presumption which arises, when the services were rendered while the parent was living as a member of the child's family, that they were gratuitously rendered.

From the Montgomery Circuit Court.

S. M. Ralston, M. Keefe and S. A. Hays, for appellant.

T. E. Ballard and E. E. Ballard, for appellees.

Ross, J.—The appellees filed a claim against the estate of Robert Stewart, deceased, in the office of the clerk of the Boone Circuit Court. The claim was not allowed, and was thereupon transferred to the issue docket for trial. On application of the appellant the venue was changed to the Montgomery Circuit Court, where the cause was tried by a jury, and a verdict returned in favor of the appellees for the sum of five hundred and eighty dollars. The appellant moved for a new trial, which motion was overruled by the court and judgment rendered on the verdict.

The first objection urged is that the complaint, or claim, filed is insufficient in that it does not state that the services for which claim is made "were furnished or rendered by said Small and wife, or either of them, or

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that they had anything whatever to do with furnishing the board, washing, etc., for which they seek to recover from his estate;" that there is nothing to show that they furnished the board, washing, sewing and nursing at the instance and request of the decedent, or that he ever agreed to pay therefor.

The claim as filed, reads as follows:

"Estate of Robert Stewart, deceased. In account with James M. Small and Laura E. Small, wife of James M. Small. Dr.

For board, washing, sewing, nursing and expense of last sickness, watching with and caring for deceased from November 1st, 1888, to Sept. 29, 1893. Total of 256 weeks. \$2,125."

The statute, sections 2465 and 2466, R. S. 1894, provides that no action shall be brought against the administrator or executor of an estate, by complaint and summons, for the recovery of any claim against the decedent, but that the holder of such claim shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending.

Does the claim filed meet the requirements of the statute? In the case of *Taggart, Admr., v. Tevanny*, 1 Ind. App. 339, a claim almost identical with the one under consideration in form and substance, was held to be sufficient. The court, in considering whether or not it sufficiently showed an agreement to pay, says:

"We think the statement contains language from which such an inference may properly be drawn. It is averred that the services were rendered, and for whom and by whom they were rendered, the nature of the services, the length of time they continued, and their value. In addition to these averments in the body of the claim the affidavit attached to it contains the statement

that the amount stated, is now justly due and owing, to the claimant."

In this case the affidavit required by section 2465, *supra*, was attached to the claim, and any indefiniteness or uncertainty in the claim proper is supplied by the statements in the affidavit. The same particularity and certainty is not required in claims filed against estates that is required in a complaint. It is sufficient if the statement apprises the administrator or executor of the nature of the claim, the amount demanded, and contains enough substance to bar another action for the same demand. *Brown, Admr. v. Sullivan*, 3 Ind. App. 211.

It is next urged that the court erred in overruling appellant's motion for a new trial. The reasons assigned in the motion for a new trial are:

"1st. Because the damages assessed by the jury are excessive.

"2d. The assessment of the amount of damages is erroneous, being too large.

"3d. The verdict of the jury is not sustained by sufficient evidence.

"4th. The verdict of the jury is contrary to law.

"5th. The court erred in giving on its own motion each of the instructions numbered 1, 2, 3, 4, 5, 6 and 7, and in giving each of said instructions."

The fifth reason is not argued by counsel, hence it is waived.

It is insisted that the evidence is insufficient to sustain the verdict in that there is no evidence tending to prove that the decedent agreed or promised to pay appellees for the services rendered. In this we think counsel are in error. True, a number of witnesses, among them several brothers and sisters of the appellee Laura E. Small, testified that she said, during her father's lifetime, that she was keeping him for the rent of forty acres of

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land which he owned, but there is other evidence, by other witnesses, of what the decedent himself said about how he was to pay for such care, namely, that Laura should have the forty acres of land. Considering all of the evidence together, we think there is sufficient from which a jury might reasonably infer a promise on the part of the decedent to pay for his board, nursing, care and attention.

It has been held, and we think correctly so, that a promise by a parent to give to a child land in consideration of boarding, nursing, care and attention is sufficient to rebut the presumption which arises, because the services were rendered while the parent was living as a member of the child's family, that they were gratuitously rendered. *Wallace, Admr. v. Long, Guar.*, 105 Ind. 522.

The amount of the recovery is not excessive.

Judgment affirmed.

Filed Nov. 16, 1894.

No. 1,367.

VAN ALLEN ET AL. v. SMITH.

REPLEVIN.—*Property not Included in Mortgage.*—*Subsequent Mortgagee.*

—*Sale.*—*Title.*—Where A sold a printing press, including blanket, stocks, wrenches and overhead fixtures for power, on payments, on which a mortgage was executed to secure the deferred payments, and in addition to the above described property a paper folder without additional price, which was not included in the mortgage, A can not replevy the paper folder from C, who was a purchaser for value, from B, in reliance on the public records of both A's and B's mortgages, which disclosed no lien on the folder, and who, in accordance with the terms of his mortgage on the folder and the other property above mentioned, executed subsequently to A's mortgage.

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advertised and sold the folder at public auction and became the purchaser thereof and took possession of the same.

From the Vigo Circuit Court.

T. W. Harper and *L. D. Leveque*, for appellants.

S. B. Davis, for appellee.

Lorz, C. J.—This was an action to recover possession of a paper-folder. The case was tried by the court, and a special finding made and conclusions of law stated, on which judgment was rendered in favor of the appellee, defendant below. The questions presented for our consideration are that the court erred in its conclusions of law and in overruling the motion for a new trial. The facts, as found by the court, are in substance as follows: On the 29th day of May, 1890, the appellants sold to the News Publishing Company one second-hand three revolution Hoe printing press, including blanket, stocks, wrenches and overhead fixtures for power. This contract of sale was reduced to writing. The News Publishing Company agreed to pay for such property \$2,600, in payments, and to execute notes and a mortgage on the property to secure the payments. In addition to the property above described the appellants agreed to furnish a Stonemetz or Dexter folder without additional price. It was further agreed that until the notes and mortgage were executed the title to the property was to remain in the appellants, but that upon the execution and delivery of the notes and mortgage the appellants would execute and deliver to said company a bill of sale of the said property. The News Publishing Company subsequently took possession of said property, made a cash payment of \$800, and executed notes for the deferred payments and a chattel mortgage to secure the same. Said mortgage was duly recorded, and describes all of the property except the folder. Afterwards, on the second day of April, 1891,

the News Publishing Company executed a note to one Douglas Smith for the sum of \$1,700, and at the same time executed to him a chattel mortgage to secure said note, which mortgage covered all of the property sold by appellants to the News Publishing Company, including the folder. This mortgage was also duly recorded. Afterwards, but before maturity, the said Douglas Smith assigned said note and mortgage, for a valuable consideration, to the appellee; that before purchasing said note and mortgage, the appellee examined the records of both chattel mortgages and had no actual knowledge of any lien or claim of the appellants upon or to said folder; that after said note and mortgage so assigned to the appellee became due, he, in accordance with the terms of said mortgage, advertised and sold said folder at public auction, and became the purchaser thereof, and credited upon his debt the amount of his bid therefor, and took possession of said folder and remained in possession until it was taken from him by virtue of the writ of replevin issued in this action. The notes given to the appellants by the News Publishing Company were not paid at maturity, and the appellants took possession of all the property described in their mortgage on the breach of conditions contained therein.

The conditions in the contract of sale above referred to are as follows:

“It is also agreed that the deferred payments above mentioned shall be secured by first mortgage on the property herein contracted to be sold.”

“It is further agreed that the title to said property shall remain in the seller until such mortgage be given, or until the purchase-price and interest have been fully paid.”

“And in case of any default in any of the terms of this

contract, the seller shall have the right to take immediate possession of said property."

"Upon the execution and delivery of the aforesaid mortgage, or the payment of the purchase-price in cash, VanAllen and Boughton agree to execute and deliver a good and sufficient bill of sale of the above described property."

The appellants insist that they were entitled to recover, for the reason that the News Publishing Company has never complied with said agreement, viz: never paid the purchase-price in cash nor executed to them a first mortgage on all the property.

The folder formed no part of the property for which the News Publishing Company agreed to pay \$2,600. The purchase-price or purchase-money is the consideration agreed to be paid by the purchaser to the seller for the thing sold. Whether the parties to this contract had in contemplation that the mortgage should include or cover the folder, admits of some doubt, but they have construed it for themselves. When the mortgage was executed it did not cover the folder. When a contract is ambiguous or uncertain, the courts generally follow that construction put upon it by the parties themselves. Their own conduct in relation to it is entitled to great if not controlling consideration.

We find no error in the record.

Judgment affirmed, at costs of appellant.

Filed Nov. 1, 1894.

New York, Chicago and St. Louis Railroad Company v. Zumbaugh.

No. 1,298.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
COMPANY v. ZUMBAUGH.

RAILROAD.—Liability for Stock Killed.—Statute Construed.—The liability of a railroad company, under section 5312, R. S. 1894, for stock killed, is not in any way affected by the terms of section 5323, R. S. 1894, requiring railroad companies to fence their lands, etc.

SAME.—Evidence.—Insufficient Cattle Guard.—Circumstance Against Sufficiency.—In an action for damages for stock killed by railroad locomotives, by reason of defective cattle guards, the fact that different animals which ought to have been kept out by it, at various times crossed it with apparent ease, is a circumstance tending to establish the insufficiency of the cattle guard.

SAME.—Evidence of Insufficiency of Other Guards of Similar Material and Construction.—Where the vice, if any existed, was inherent in the plan and general make-up of the cattle guard itself, evidence of the insufficiency of another guard three or four miles distant of similar material and construction was competent.

From the Marshall Circuit Court.

M. A. O. Packard, J. Morris, R. C. Bell, J. M. Barrett and S. L. Morris, for appellant.

C. Kellison, for appellee.

GAVIN, J.—The appellee recovered judgment against appellant for the value of stock which had entered upon its right of way by reason of insufficient cattle guards, and was then killed by its trains.

The appellee's right of action is founded upon section 5312, R. S. 1894, section 4025, R. S. 1881, and not upon section 5323, R. S. 1894, being the act of 1885, requiring, in direct terms, that railroad companies shall fence their lands under certain circumstances, and in default thereof, the adjoining land-owner may do so and recover the cost thereof.

Section 4 of the act of 1885, being section 5326, R. S. 1894, expressly provides: "Nothing in this act con-

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tained shall in any manner affect or change the liability of railroad corporations, or of the assignees, lessees, or receiver of such corporations, for stock killed or injured upon their railroads; but such liability shall exist and be governed by laws now in force the same as if this act had never been passed."

The liability of the railroad companies for stock killed is not, therefore, in any degree limited or lessened by the terms of said section 5323.

While they are not, by this section, compelled to fence their road through uninclosed and unimproved lands, they are, none the less, liable, under the former law, for stock killed by reason of their failure to fence their roads through such lands. *Louisville, etc., R. W. Co. v. Hughes*, 2 Ind. App. 68; *Louisville, etc., R. W. Co. v. Consolidated, etc., Co.*, 4 Ind. App. 40; *Ohio, etc., R. W. Co. v. Wrape*, 4 Ind. App. 108; *Jeffersonville, etc., R. R. Co. v. Dunlap*, 112 Ind. 93.

Counsel urge the failure of the evidence to sustain the verdict, insisting that it does not show the insufficiency of the cattle guard over which the horses passed in entering upon the right of way. The cattle guard was minutely described to the jury, both as to the materials and mode of construction. It also appeared, from the evidence, that at different times a bull, a colt, two mules, a cow, a buck sheep and a cow and calf had been seen to walk over this guard, or similar ones in the vicinity of it, without any apparent injury, and without being forced across. In the light of all this evidence it was for the jury to determine the insufficiency of the guard, and we can not overthrow its determination. *St. Louis, etc., R. W. Co. v. Ritz*, 33 Kan. 404; 3 Wood Am. Ry. Law 1861, section 419.

In our opinion, the evidence in all things sustains the verdict.

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Objection is made to testimony that a horse and a cow and some colts were seen to walk or pass over the guard, for the reason "that the cattle guard was not to be for a particular species of animals, but for all animals."

It was certainly hardly to be expected that proof would be made by one witness that all kinds of animals walked over this guard upon one occasion. The fact that different animals, which ought to have been kept out by it, at various times crossed it apparently with ease, was a circumstance tending at least to establish its insufficiency.

Counsel protest earnestly against the action of the court in permitting witnesses to testify to seeing animals walk over a guard some three or four miles distant from the one in controversy. They insist that they ought not to be called upon to meet an issue as to a different guard involving different occasions and facts from those under consideration. The guard in controversy was a metal surface guard. There was no evidence tending to show it to be out of repair or imperfectly built. The vice, if any existed, was inherent in the plan and general make-up of the guard itself. There was evidence by other witnesses showing that the guards were similar in material and construction. If one was insufficient the other was. For this reason we are of opinion that the court committed no error in admitting the evidence.

Judgment affirmed.

Filed Nov. 1, 1894.

The Muncie Pulp Company v. Jones.

No. 1,139.

THE MUNCIE PULP COMPANY v. JONES.

MASTER AND SERVANT.—*Duty of Master to Servant.—Delegation of.—Liability.*—A duty which the master owes to the servant can not be delegated to another servant or agent, whether of high degree or low, so as to absolve the master from liability for its nonperformance.

SAME.—*Negligence.—Dangerous Place to Work.*—It is negligence on the part of the master to have in the third floor of its building, where men were set to work, a hole nine feet by twenty-eight, covered with rotten canvas, without any guard about it, or any warning to its employes of its existence.

SAME.—*Safe Place to Work.—Scope of Rule.*—The duty of the master to keep the working place safe does not cease when he has provided competent men and proper materials to work with.

SAME.—*When Servant Chargeable with Knowledge of Danger.—Opening in Floor.*—Where it appears that the servant entered the third floor of the building and found a canvas stretched down on it; that he was ordered to lay planks across there to walk on; that he saw his fellow-workmen walk around it and not across it; that he shoved a plank over it, saw it sag down, and placed one board on top of another lest one should break, and thought the canvass was put there to catch a person if he should step on it, the servant ought, in the exercise of reasonable care, to be chargeable with knowledge of the hole under the canvas, and will be deemed to have had actual knowledge thereof.

From the Delaware Circuit Court.

J. W. Ryan and W. A. Thompson, for appellant.

G. W. Cromer, R. S. Gregory and A. C. Silverburg, for appellee.

GAVIN, J.—Action by the servant against the master to recover damages for personal injuries received by falling through a hole in a third story floor, covered over with rotten canvass.

Appellee was a common laborer employed in other portions of appellant's grounds and mill. About two o'clock on the morning of June 5th, he went to this third

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floor and, pursuant to his master's directions, was engaged in carrying boards on a plank walk laid across a hole eighteen feet by twenty-eight, which was covered over with rotten canvass so as to completely conceal the hole. While so engaged, appellee was, without his fault, jostled and knocked off the plank walk, and thrown upon the canvass, which gave way and let him fall twenty-eight feet to the ground, inflicting serious injuries upon him without any fault or negligence upon his part.

The existence of the opening and the rotten condition of the canvass were known to the appellant and unknown to the appellee, who was set to work without any warning as to the dangerous conditions under which he was working. These are, briefly stated, the principal facts set forth in the complaint, so far as they are requisite to this decision.

While the averment of want of knowledge "at and before the 5th day of June, 1892," may not be the best and most accurately chosen language to express the meaning of the pleader, we regard it as clear that the word "at" is used for "on." No one could be misled as to the idea intended to be expressed. *Indiana, etc., R. W. Co. v. Daily*, 110 Ind. 75.

Counsel argue with much ingenuity that the appellee must be held to have had knowledge of the hole and its condition. The facts pleaded are not strong enough to justify us in so holding in the face of the direct averment of want of knowledge.

It is further contended that the averments of the complaint do not show the officers named as acting for the appellant to have been vice principals, and the position seems to be taken that the corporation is responsible only for the acts of its directors. The law must be regarded as settled in Indiana that it is the duty of the master to use reasonable care to provide a safe working place for

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his employes. *Evansville, etc., R. R. Co. v. Holcomb*, 9 Ind. App. 198, and cases cited; *Evansville, etc., R. W. Co. v. Duel*, 134 Ind. 156; *Nall, Admx., v. Louisville, etc., R. W. Co.*, 129 Ind. 260.

This duty is one which can not be, by the master, delegated to any other servant or agent, whether of high degree or low, so as to absolve the master himself from liability for its nonperformance. *Evansville, etc., R. W. Co. v. Holcomb, supra*, where numerous authorities are collated.

Under the averments, the danger encountered by appellee was known to the appellant and unknown to the appellee. It was, therefore, incumbent upon the appellant to notify him of such danger. *Salem Stone, etc., Co. v. Griffin*, 139 Ind. 141.

It must be borne in mind, however, that the averment of want of knowledge includes not only actual but constructive knowledge. *Parke County Coal Co. v. Barth*, 5 Ind. App. 159; *Lake Erie, etc., R. R. Co. v. McHenry*, 10 Ind. App. 525; *Evansville, etc., R. W. Co. v. Duel, supra*; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58.

In our opinion the complaint is not liable to the objections urged against it. It is, however, peculiar in that there is no direct allegation of any act being negligently done or omitted by the master. No objection is made to the complaint upon this score, but it is certainly safer in actions of this class to characterize the acts or omissions as negligent by direct averment. *Louisville, etc., R. W. Co. v. Hicks*, 39 N. E. Rep. 767.

There was a special verdict upon which judgment was rendered in favor of appellee.

There is no want of harmony between the theory of the complaint and the facts as found by the jury.

While there are some facts which indicate that appellee had knowledge of the hole in the floor, still they can not

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override the express finding that he had no knowledge whatever of its existence.

The verdict sufficiently shows that the appellant was negligent in setting appellee to work over a dangerous chasm, insecurely covered with a rotten canvass, without giving him any warning of the danger. Moreover we regard it as clear that it was negligence upon the part of appellant to have in the third floor of its building, where men were set to work, a hole nine feet by twenty-eight, covered over with rotten canvass, without any guard about it or any warning to its employes of its existence.

The appellee was justified in obeying the orders of the superintendent and the night boss, who had charge of appellant's business. They were clearly his superiors, with authority to direct his movements about the factory. He can not be held guilty of negligence in failing to make the plank walk across the canvass wider when he was in utter ignorance of the opening under the canvass. There could be no negligence in failing to guard against something whose existence he had no reason to suspect. In addition to this the verdict finds that the foreman or night superintendent directed the use of two planks, and these were used.

We can not accede to counsel's proposition that the measure of the duty of appellant with reference to keeping safe the working place was to provide competent men and proper materials to work with. The authority cited, Wood on Master & Servant, section 452, shows that while some courts so hold, this is not the general rule, and in Indiana those authorities to which we have already referred declare the contrary.

We can not sustain the objections to the special verdict.

The sufficiency of the evidence to support the verdict is also assigned as error.

In the verdict it is found that appellee had no knowledge of the existence of the hole in the floor, but it is not found that he was ignorant of the rotten condition of the canvass covering it.

Conceding it to be true that he had no actual knowledge of the existence of the hole in the floor, his own evidence is of such a character as irresistibly compels the belief that the facts were such that he ought to have known it, and must be held chargeable with constructive knowledge at least.

It appears from his own evidence that he went, by his superior's direction, to this third floor about 2 A. M. to help tear down and move a chip bin.

The room was a large one. Near the bin, which was to be torn down, there appeared, spread upon the floor, a large canvass, nine feet or more by twenty-eight. The superintendent told appellee and another workman to lay two plank across there to walk over. The other workman walked around (not across) the canvass to the other side.* Appellee then took a long two-inch plank, from twelve to sixteen inches wide, and shoved it across the canvas to his fellow-workman, who put it upon the floor on the other side. He then placed the end of another plank upon the first one and shoved it across. The room was poorly lighted with natural gas. The two men then carried the long boards across the hole, walking on this plank gangway.

We now set out in detail a number of the questions and answers by appellee, which, in our judgment, charge him conclusively with constructive knowledge that there was a hole under this canvass, and that it was not a solid floor. We can not set out all of his evidence, but only detached parts of it bearing upon this proposition.

"Q. What knowledge did you have of this third floor

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on the night that you went up there? A. None at all, sir.

"Q. What was the appearance of the floor up there when you went up? A. Well, it looked to me like it would hold a person up.

"Q. You may state to the jury what knowledge you had of the condition of the floor or the sheeting that was over the hole at the time you were carrying the board across when you fell through. A. I didn't know how it was fixed; all I could see was the canvas over it.

"Q. How did you put them (the boards to walk on) in position? A. I slipped my end on the canvas, right over to him, and he put it up on the floor on the other side.

"Q. What did you lay one on the top of the other for? A. I was afraid one of them would break.

"Q. Why didn't you put down more? A. I thought that would hold us, and that was all that Pat told us to put down.

"Q. Now, if there was any reason why you did not lay down more boards there, tell the jury. A. Well, I didn't think of any danger; seeing that canvas there I thought that was put there a purpose to catch a person if they stepped onto it.

"Q. Why did you put any boards down there, then, if you could step and walk on that? A. Because it would spring down with us.

"Q. What did you step on it afterwards for? A. I couldn't help myself.

"Q. You knew it was a dangerous place, didn't you? A. No sir, I did not.

"Q. Why did you put the boards down? A. Because, as I told you before, the canvas would give down with us and we couldn't get up on the other side.

"Q. Can you give any reason why you didn't pick up

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the end of it (the board) and walk across that (the canvas)? A. Anyone would suppose there was something there or they wouldn't have the canvas there.

"Q. Now, when you pushed that board across there on that piece of canvas, couldn't you see that the canvas sagged under the end of your board that you were pushing across? A. It swagged some; yes, sir.

"Q. Didn't that teach you, a man of your intelligence, that there was no floor under there? A. I didn't know how far it was to the floor.

"Q. You knew that it sagged? A. Yes, sir."

Appellee was under no obligation to search for hidden defects unless the facts were such as to necessarily convey to his mind, or to the mind of a reasonable man, the presence of such defect, but when it appears that appellee entered this third floor of a pulp mill and found a canvas stretched down on it, was ordered to lay planks across there to walk on, saw his fellow-workman walk around it and not across it, shoved a plank over it, saw it sag down, placed one board on top of another lest one should break, thought the canvas was put there to catch a person if he should step on it, we are of opinion that there is no escape from the conclusion that if he didn't know there was a hole under the canvas he ought to have known it. While he had a right to presume that the master had performed his duty and provided a safe working place for him, still he could not be permitted to blindly rely upon this presumption to the utter disregard of the plain and palpable evidence of his own senses.

If the verdict had found that he had no knowledge of the rotten condition of the canvas, we might still sustain the judgment of the court, or if the facts found showed such a degree of care by appellee as was commensurate with his knowledge of the danger he was encountering, the conclusion of the court might still be upheld, upon

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the theory that, having been directed to a different work at a different place from that of his regular employment, he did not, by reason of his knowledge, assume the risks even of the known danger, but might recover upon proof of proper care upon the principle laid down in *Brazil, etc., Coal Co. v. Hoodlet*, 129 Ind. 327; *Louisville, etc., R. W. Co. v. Hanning, Admr.*, 131 Ind. 528; *Cincinnati, etc., R. R. Co. v. Madden*, 134 Ind. 462.

The finding as to the care exercised by appellee is exceedingly meager and entirely insufficient to enable us to say that he was exercising proper care when held chargeable with knowledge of the hole and the condition of the canvas.

Since we are compelled to hold that the appellee ought, in the exercise of reasonable care, to have known there was a hole in the floor, he must in law be deemed to have had actual knowledge thereof. *Lake Erie, etc., R. W. Co. v. McHenry, supra*; *Evansville, etc., R. W. Co. v. Duel, supra*; *Pittsburgh, etc., R. W. Co. v. Woodward*, 9 Ind. App. 169.

The verdict is, therefore, as to this essential feature of knowledge unsustained.

In thus holding we have not lost sight of the established rule that this court will not undertake to solve the doubts arising from a conflict of evidence. But, with this rule fully in mind, we are unable to discover any conflict upon the proposition on which the case has turned.

The evidence of repairs made after the accident was not admissible. *Terre Haute, etc., R. W. Co. v. Clem*, 123 Ind. 15; *Board, etc., v. Pearson*, 129 Ind. 456.

We are unable to regard it, as viewed by appellee's counsel, as so interwoven with other competent evidence of the witnesses as to be inseparable from it. Whether or not the principal question as to this evidence is prop-

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erly saved is quite doubtful. We do not, therefore, found the reversal upon these rulings.

The judgment is reversed, with instructions to grant a new trial with leave to amend the complaint if desired.

Lotz, C. J., did not participate.

Filed Nov. 2, 1894.

No. 1,047.

ROMONA OOLITIC STONE COMPANY v. PHILLIPS.

MASTER AND SERVANT.—Defective Machinery.—Failure to Repair.—Negligence.—Where an employer has ample notice that machinery which an employe is required to use is, by reason of long continued use and wear and improper adjustment, defective and dangerous, and fails to put the same in proper condition, he is guilty of negligence.

SAME.—Contributory Negligence.—Answers to Interrogatories.—Overcoming General Verdict.—An answer by a jury to interrogatories that an employe, who was injured in the line of his service while operating machinery with which he was familiar, could have avoided the injury by giving attention to where he was putting his hands and what he held in them, is not in itself sufficient to overcome a general verdict giving damages, but it should be further shown that the failure to give such attention was the result of negligence on the employe's part.

SAME.—Promise of Master to Repair Defect.—Reliance of Servant Upon Promise.—Increase of Risk.—Question for Jury.—Where an employe, injured by reason of defective machinery, had continued in the service of the employer in reliance upon the latter's promise to repair, it is ordinarily for the jury to determine whether the defect increased the danger, and whether the employe was exercising due care; and the belief of the employe that his work might be safely done notwithstanding the defect, is not always conclusive on the jury as to whether there was any danger or increase of danger on account of such defect.

SAME.—Promise to Repair Absolves from Increased Risk.—Additional Care.—Where there is a defect in machinery increasing the employe's danger, and the employer promises to repair, and in reli-

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ance upon this promise the employe continues in the service, the latter is, for a reasonable time, absolved from the assumption of the increased risk, but he must use such additional care, in proportion to the increased and known danger, as a man of ordinary prudence ought to exercise under the circumstances.

SAME.—*Failure of Fellow-servant to Make Repairs Does Not Relieve Master.*—Where a machine hand is injured by reason of a defective belt which the employer had promised to repair, the fact that the omission to remedy the defect occurred through the fault of another servant charged with the duty can not relieve the employer.

SAME.—*Question of Negligence for Jury, When.—Inferences.—How Considered on Appeal.*—The question of negligence must be submitted to the jury as one of fact not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to inferences which might be fairly drawn from the conceded facts, and, on appeal, such reasonable inferences as the jury might have drawn from the evidence, considered in the light most favorable to the party having the verdict, will not be disturbed.

SAME.—*Instruction.—Erroneous Theory.*—Where, in an action by an employe against his employer, to recover damages for injuries, the theory of the complaint is that the dangers of the service in which the plaintiff was engaged was increased by reason of defects in machinery which the employer had promised, but failed, to repair, an instruction which tells the jury that among the questions to be considered by them in determining the right of the appellee to recover is whether the place in which the plaintiff was employed was unsafe or the machinery dangerous, without any statement limiting the question to the increased hazard, is erroneous.

Ross, J., dissents from that part of the opinion holding the complaint sufficient.

From the Morgan Circuit Court.

F. Winter, W. H. H. Miller, J. B. Elam, J. H. Jordan and O. Matthews, for appellant.

D. E. Beem, W. Hickam and W. R. Harrison, for appellee.

DAVIS, J.—This was an action by an employe against his employer for personal injuries alleged to have been sustained in the course of his employment. It was tried by a jury four times in the Morgan Circuit Court. The

first verdict was set aside by Judge Grubbs. It was next tried before the Hon. John V. Hadley, who set aside the second verdict returned in favor of appellee. The Hon. Henry C. Duncan, a practicing attorney, was then appointed special judge to preside in the cause. The first trial before him resulted in a disagreement of the jury. On the second trial before Judge Duncan a verdict was returned in favor of appellee for \$1,500.

Over a motion for a new trial, as well as other motions made in the cause, judgment was rendered upon this verdict. Exceptions were duly reserved to various rulings of the trial judge, and this appeal is prosecuted from the judgment so rendered.

Several assignments of error are made. The complaint upon which the judgment appealed from was rendered is in two paragraphs. The assignments of error with respect to these are:

1st. That the court erred in overruling a demurrer by the appellant to the entire complaint.

2d. That the court erred in overruling a demurrer by the appellant to the first paragraph of the complaint.

3d. That the court erred in overruling a like demurrer to the second paragraph of the complaint.

4th. That the complaint does not state facts sufficient to constitute a cause of action.

These assignments may be considered together. The first paragraph of the complaint was filed in the Owen Circuit Court, from which the venue was subsequently changed to the Morgan Circuit Court. This first paragraph avers in substance that the appellee was in the employ of the appellant which was engaged in the business of quarrying and dressing stone in Owen county, Indiana; that appellee as such employe was engaged in this work; that his particular employment was in connection with the operation of a planer used to plane

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stones of large dimensions; that said planer was a machine operated by steam power, and consisting in part of a crosshead which carried certain bits made of iron and steel, and which were brought in contact with the stone to be planed, and made the surfaces thereof smooth; this crosshead weighed 16,000 pounds; that it was necessary in the prosecution of the work to occasionally raise and lower the crosshead in which these bits were placed; that it was so raised and lowered, when the machinery was in proper condition, by means of a large wooden pulley placed above it, around which ran a large belt, which also ran upon a smaller pulley attached to the planer below; that when this belt was of proper strength and tension, and the pulleys in proper position the crosshead was easily raised and lowered by means thereof without danger to employes operating the planer; that prior to the 20th day of February, 1890, the belt and pulleys had, from improper adjustment, long continued use and wear, become out of repair, worn and insufficient to raise and lower the crosshead, whereby the machine became unsafe and dangerous to employes operating it; that by reason of the defective condition of the machine, as the result of said defects, it became necessary, in order to operate said machine, for employes, while hoisting and raising the crosshead, to stand in front of the belt and press upon it with great force with an iron rod held in the hand in order to increase its tension and make it lift the crosshead; that appellee, for several weeks prior to said 20th day of February, had been employed as an assistant in the operation of this planer, and that said machine gradually failed, from said defects, to perform its functions, and as the belt failed to raise the crosshead, he from time to time notified the appellant company of its impaired and dangerous condition, and that the appellant company, in each

and every instance, promised to repair and put the same in proper condition, but negligently, carelessly and without excuse failed and neglected so to do; that appellee, relying upon these promises and assurances, and believing that the machinery would be repaired and rendered safe, continued in the employment and in the performance of the hazardous duties mentioned, for several weeks prior to said 20th day of February; and that upon said day, while engaged in the line of his employment and in the operation and management of the planer, under the direction of appellant's managers and superintendents, and without any carelessness, default or negligence on his part, and while in the exercise of proper caution, and owing wholly to the defective condition of said machinery as above alleged, appellee's right hand was caught in said belting and pulleys and crushed, lacerated and otherwise injured, that such injury was permanent, and caused great suffering.

Judgment for \$10,000 is asked.

The first trial of the cause was upon this paragraph of the complaint; but before the second trial a second and additional paragraph was filed. This paragraph contains the same allegations as the first with reference to the appellant corporation and the business in which it was engaged, and also with respect to the kind of machinery by which such business was carried on, and then proceeds to allege that while the plaintiff was engaged as a helper upon the planer, he was caught in the belts, pulleys and wheels of the machinery while they were running at great speed, and was thereby greatly injured; that his injury occurred solely as the result of the dangerous, defective and unsafe condition of said machinery, which had, by improper adjustment of its pulleys, shafts, belts and the machinery used in turning the power on and off the same, and by becoming worn, weak and out of

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repair, become unsafe and dangerous to employes engaged in the performance of their duties; that this dangerous, defective and unsafe condition of the machinery was well known to the appellant company, and that it had frequently promised to repair and readjust the same so that it would safely and properly perform its functions; that the appellant carelessly, negligently and without any excuse failed to make such repairs, but with full knowledge of its defective condition negligently permitted the same to remain out of repair; that appellee, relying upon the said promises, continued in the employment to the day of his injury, and while exercising due care, and without any fault or negligence on his part, but as a result of the dangerous and defective condition of the machinery, he was caught therein and injured.

There are similar averments as to the extent of the injury, pain resulting therefrom, etc., as those in the first paragraph of the complaint, and the damages demanded are \$5,000.

To the first paragraph of the complaint, while it stood as the only complaint in the action, a demurrer for the want of facts was filed and overruled. A similar demurrer was filed to the second additional paragraph and also overruled and proper exception reserved.

Counsel for appellant contend that the first paragraph of the complaint under consideration does not aver negligence on the part of the appellant occasioning appellee's injury.

This is the only point suggested or discussed as to the sufficiency of the complaint. No question is raised in argument on this branch of the case in relation to contributory negligence or assumption of the risk on the part of appellee. It is conceded, at least the proposition is not controverted, that the first paragraph of the complaint is sufficient if it charges actionable negligence on

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the part of appellant as the proximate cause of appellee's injury. The substance of the argument is that the defective and dangerous condition of the machinery at the time of the accident is not shown to have been due to negligence of appellant. Counsel say "that it does not follow as a matter of law that defendant was guilty of negligence simply because it had this machinery."

The infirmity in the argument is the fact that it appears from the allegations in the first paragraph of the complaint that the defects which created the unsafe and dangerous condition arose out of the long continued use and wear, and improper adjustment of the machinery by appellant, and that the appellant had due notice and knowledge of such defects, and the consequent unsafe and dangerous condition thereof, for several weeks prior to the accident, and that appellant negligently, carelessly, and without excuse, failed to make the necessary repairs and put the machinery in proper condition.

It is the duty of the master to exercise reasonable and ordinary care in providing reasonably suitable machinery and appliances to enable the employe to do his work as safely as the hazards incident to the business will permit. If the master fails in this duty he is responsible for any injury which may happen to the employe through defects in the machinery which were known to him, which it was his duty to repair, except where the employe has assumed the risk incident to the use of such defective machinery, or has contributed to the injury by his own negligence. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Rogers v. Leyden*, 127 Ind. 51; *Indianapolis Union R. W. Co. v. Ott*, 11 Ind. App. 564; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20.

It is charged, in substance, that the company provided the stone planer for the work in which it was engaged; that when the machinery was kept in proper condition,

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the planer could be safely used; that the company permitted the machinery (the planer) to become worn, weak, out of repair, dangerous, and defective, and that the company had actual knowledge of the defective and dangerous condition for several weeks prior to the injury, and negligently failed to make the necessary repairs.

The facts alleged, the truth of which the demurrer admits, show that the master was guilty of negligence in failing in the discharge of his duty to keep the machinery in question in proper repair, and in safe working order. It was negligence on the part of appellant to continue to use and operate unsafe and dangerous machinery with knowledge of the defects and dangers incident thereto under the facts and circumstances alleged in the complaint. It is conceded, if the first paragraph of the complaint states a good cause of action, that the second paragraph is sufficient.

The next error assigned is the overruling of appellant's motion for judgment on the answers of the jury to the interrogatories.

The jury returned a general verdict in favor of the appellee. They also returned answers to interrogatories propounded by each of the parties.

In answer to the interrogatories, the jury found that appellee was injured while engaged as a helper in the line of his duty in operating a stone planer in the quarry of appellant; that he received said injury because the planer was defective and out of repair; that appellant had been notified that said planer was out of order, and would not work properly before appellee was injured; that he was required by appellant to perform the service he was engaged in doing when he was hurt; that appellant promised appellee before he received his injury to repair the planer; that he was induced by such promise, and the promise to relieve him from service on the

planer soon, and give him other work in the quarry, to continue in appellant's service in the use of the planer; that his hand was drawn between the pulley and the belt by the rivets or lacing, hitting the rod and knocking his hand down; that immediately before the accident he was holding his hand from twelve to fifteen inches above, and forward of, the pulleys; that at the time of his injury appellee could see the belt and pulley, and that he understood the manner in which they operated well enough to know that he would be hurt if his hand was drawn between them; that it was not necessary for appellee to do anything more than to give attention to where he was putting his hands, and what he held in them to avoid getting his hands caught and drawn between the pulley and the belt; that appellee was using reasonable care to avoid his injury at the time he was injured.

In discussing the assignment under consideration, counsel for appellant say: "The whole dispute has been, and is now, as to whether this injury happened by any negligence of the appellant, and as to whether the appellee was free from contributory negligence." In this action it was necessary for three things to appear, as contended by counsel, before appellee could recover, namely, that he was injured; that his injury happened by the negligence of the appellant, and that he himself was free from contributory fault.

This being true, if the findings of the jury upon the special interrogatories show affirmatively that either of these three essential facts does not exist, then there should be a judgment against the appellee. That appellee was injured, and that his injury was caused by the negligence of appellant is not controverted by the special findings of the jury. On this branch of the case, the argument of counsel for appellant is confined to the proposition that the answers of the jury to the inter-

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rogatories show that negligence on the part of appellee contributed to his injury. In this connection counsel for appellant say that the only effect of the promise to repair the planer was "to excuse appellee for continuing in the employment." In other words, the promise of appellant to repair the planer removed all ground for the argument that appellee by continuing in the employment, under the circumstances, assumed the risks of the dangers incurred by the use of the defective and unsafe machinery. *Indianapolis Union R. W. Co. v. Ott, supra.*

The only question, therefore, that we are required to determine under the assignment we are considering is whether the answers to the interrogatories disclose such a state of facts as will excuse appellant on the ground of contributory negligence on the part of appellee.

It should be borne in mind that the jury by their general verdict have presumably found every material allegation of the complaint to have been proven, and that conclusion conclusively prevails in this court unless the contrary is clearly shown by the answers to the interrogatories. Such answers will not be aided by intentment. The special findings override the general verdict only when both can not stand, and this antagonism must be apparent upon the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered. *Lake Erie, etc., R. R. Co. v. McHenry*, 10 Ind. App. 525; *Kentucky and Indiana Bridge Co. v. McKinney*, 9 Ind. App. 213; *Indianapolis Union R. W. Co. v. Ott, supra.*

If the answer to the interrogatory in which the jury find that appellee was in the exercise of ordinary care

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should be disregarded, the fact still remains that the general verdict includes a finding that he was, when he was injured, in the exercise of ordinary care and free from fault. Now, in view of the rule of law applicable in such cases, does the conclusion necessarily follow that because appellee could see the belt and pulley at the time of his injury and understood the manner in which they operated, well enough to know that he would be hurt if his hand was drawn in between them, and that it was not necessary for him to do anything more than to give attention to where he was putting his hands and what he held in them to avoid getting his hand caught and drawn in between the pulley and belt, he is chargeable with negligence contributing to his injury.

In this connection it should also be remembered that if under all the circumstances, and in view of the promise to remedy the defect, the appellee was not wanting in due care in continuing to use the defective and dangerous machinery, or the manner in which he used the same, then the appellant will not be excused for the omission to supply proper and safe machinery on the ground of contributory negligence. If the danger on account of the use of the defective machinery was not of so grave a character that it would deter a reasonably prudent man from incurring it, and if in the line of his duty appellee used care commensurate with the danger, he was not guilty, *per se*, of contributory negligence. *Indianapolis Union R. W. Co. v. Ott, supra.*

If the facts and circumstances which might have been proven under the allegations in the complaint are such that the answers of the jury to the interrogatories, when construed in connection with such facts and circumstances, lead inevitably to but one conclusion, and that the conclusion of contributory negligence on the part of appellee on this occasion, then appellant was entitled to

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judgment on the answers to the interrogatories, notwithstanding the general verdict. Conceding that attention is synonymous with care and that all it was necessary for appellee to do to avoid getting his hand caught and drawn in between the pulley and the belt was to give attention to where he was putting his hands and what he had in them, the finding is not equivalent to saying that in the performance of the work he was doing in and about the defective and dangerous machinery, under the direction of the master, when he was injured he could, in the exercise of care commensurate with the known danger, have given such attention to where he was putting his hands and what he had in them as would have avoided getting his hand caught and drawn in between the pulley and the belt. In order to successfully perform the task which he was doing when he was injured, it may have been necessary, in the position in which he was placed, in the exercise of care commensurate with the danger incident to the use of such defective and dangerous machinery, for him to divert his attention, temporarily at least, from where he was putting his hands and what he had in them. The master, notwithstanding the unsafe and dangerous condition of the machinery and his promise to repair the same, had the right to expect that appellee should give care and attention commensurate with the known danger, to the performance of the work he was doing, but we can not say, as a matter of law, in view of all the facts and circumstances which may have been shown under the issues on the trial, that he was in such fault as to render him guilty of contributory negligence simply because all that it was necessary for him to do to avoid the injury was to give attention to where he was putting his hands and what he had in them. If he had not attempted to per-

form the duty in which he was engaged he would not have been injured, but the fact that he undertook to do the work does not necessarily constitute contributory negligence. It may not have been consistent with the strength and attention necessary to execute the task he was assigned to do to have given the attention referred to in the interrogatory, to where he was putting his hands and what he had in them. The jury evidently made a discrimination between attention to where he was putting his hands and what he had in them and care in doing the act which caused his injury, and whether such discrimination is one founded in fact we can not determine on the answers of the jury to the interrogatories, in view of the issues and the general verdict.

The next assignment of error is the overruling of a motion for a new trial. Among other reasons stated for a new trial are that the verdict is contrary to the law, contrary to the evidence, and not sustained by sufficient evidence.

These reasons have been discussed and may be considered together.

There is evidence in the record tending to prove the following facts: Appellee, when he was injured, was thirty years of age. In August or September prior to his injury in February, he was taken off the stone-cutters' yard, where he had been employed for some time, to work on the planer for a few days until they could get a man for the work from Bedford, but he was kept continuously at work on the planer until he was hurt. When he went to work on the planer the belts raised and lowered the crosshead in a proper manner. In the course of a month or two the belts became so loose that they would not raise or lower the crosshead unless the employes operating the planer got up above the planer on top of an arch or beam eight or ten feet from

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the ground and put pressure on the belt with a stick, iron rod or hook. This was often done by appellee—some days several times—under the direction of the head workman or superintendent, for two months or more before he was injured. He generally used for this purpose an iron hook that they raked spawls off the bed of the stone with. It was a half round hoop iron, flat on one side and round on the other, two feet long, with a hook in the end. The pressure was made by putting the stick, rod or hook against the belt and bearing down, and this pressure would put the proper tension on the belt, thus giving it greater power on the pulley, and in this manner, through the other necessary appliances, raised or lowered the crosshead to the desired position. After the machinery got in a fix so it would not raise and lower this crosshead, and appellee was put to aiding it, as herein indicated, he often asked the superintendent “if he would not fix it,” and he replied, “We will fix it,” but the belts were not changed, new ones were not put in, and the machine was not fixed. Appellee relied on the continued promises to fix it. He says his request to have it fixed was because it was an unhandy place to go; that it was inconvenient to get up there, but that he never thought there was any danger in going up there and putting the pressure on the belt, and, in his opinion, this method of raising the crosshead was safe. On this occasion they shifted the straight belt over on the tight pulley to raise the crosshead. Appellee put the pressure on the belt with the hook to raise the crosshead, and it would not raise.

In describing the manner in which appellee was injured, he says:

“Now, at the time you were hurt what were you doing? I was working on the planer, and they wanted to raise the crosshead, and I got up with the iron hook.

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"Who told you to get up? Mr. Bruce.

"Were you subject to his orders? Yes, sir.

"State what you did. I got up with my hook to put pressure on the belt to raise the crosshead.

"Where did you go? Right up in front of the three little pulleys on top of the arch, on top of the planer.

"How high were you from the ground? Eight or ten feet.

"Was there any other place you could go to do that work there? No; no place up near the top.

"That was the only place to go? Yes, sir.

"Well, now, when you got up there what did you do? We shifted the belt over.

"How did you do that? Bruce shifted the straight belt over on the tight pulley to raise the crosshead, and it would not raise.

"Why would not it? It would not raise with the pressure on it. The pulleys were greasy, we oiled them, and I hollowed down to Bruce to throw me up a piece of waste to wipe the pulley off, and that maybe it would go, and he threw me up a piece of waste, and he shifted the belt back on the loose pulley, and that left the tight pulley without the belt on it, and I wiped it off, and he shifted it back, and I got caught before he shifted it back."

In giving the particulars he says:

"I got the hook and held on each end of the hook.

"2. Illustrate how you handled it? Just like that (illustrating), had both hands, one hand on each end, and had it coming like that (indicating) on the belt to help climb over off the loose pulley on the tight pulley, and it hit the lacing or rivet or something on the belt * * *

"Explain fully to the jury how your hand got into the pulley—what position? I was like this (indicating),

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and the belt was coming down to me, the straight belt running towards me, and when I put this rod on the belt, it hit the rivet or lacing, and knocked my hand between the belt and the loose pulley, and it stopped the pulley, and the belt kept going, etc."

"He further says if the belt was a little slack sometimes the shifter would shift the belt, and sometimes it would not, and that on this occasion he put the 'hook against the belt coming to make it climb' on the tight pulley."

The superintendent testified that the belts would become stretched so they would not raise the crosshead, and that they had been tightened frequently, and that they were made tight enough to raise the crosshead, and that when they became loose they were not always tightened at once for want of time, and they then "would tighten them with a stick," and that he did not think there was any danger in tightening them temporarily with a stick or rod. There was evidence tending to prove that it was customary for the man who ran the planer, the first man, with the assistance of the helper, to tighten the belts by cutting off the ends, punch new holes, and lace them up again, but so far as shown this was never done during appellee's service prior to his injury. It does not appear that appellee had any notice of this custom. The evidence tends to prove that when appellee complained to the superintendent of the defect, he promised to fix it..

Appellee further testified:

"You say the whole trouble in this case grew out of the fact that the shifter would not shift the belt? Yes, sir.

"Otherwise you would not have been touching the belt at all? It would not climb. I would not have been touching it on the loose pulley. * * *

"You had to do that because the shifter would not shift it readily, and you were hurt? Yes, sir."

Also, that the belt sometimes refused to go easily off the loose pulley on to the tight pulley, and that it was then necessary to aid it in the way of the application of pressure—the coming above indicated.

On the third of May, after appellee was injured, he returned to work for appellant and ran the big planer on which he was hurt, until the 18th of August. It was during all this time in the condition it was in when he was hurt and worked in the same way. The employes continued during that time to go up and assist the belts and work the shifters as they had done at and before the time appellee was injured.

Appellee appears to have been of the opinion, prior to his injury, that there was no danger on account of the defects. Whether this was his opinion afterwards does not appear, except it is shown that after his injury he never assisted in tightening the belts or helping the shifters. This work was done by other employes. With full knowledge of the defects and experience in the work, his opinion was, in our opinion, entitled to great weight on the question that there was no danger on account of the defects, but his opinion was not conclusive on the jury.

In view of the defects, the situation described in the evidence, all the attendant circumstances and the inferences fairly deducible therefrom, and the fact that except for the defect the accident in question could not have occurred, it was for the jury to determine whether the defects created or increased the danger.

It is true there was ample evidence tending to prove that appellee was, when he was injured, doing work that was safe if done with reasonable care at a place where he was not exposed to great danger if he was giving at-

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tention to what he was doing, and that all the parties, employer and employes, conversant with the situation, believed that there was no increased danger in doing this work. The appellee appears to have had full knowledge of the situation and to have been as capable of judging of the danger incident to the work in which he was engaged as anybody.

Where it is shown in such case that the machinery has become defective, which defect the employer has promised to remedy or repair, and an employe who continues in the service in reliance on such promise is injured by reason of such defect it is ordinarily a question for determination by the jury whether such defect increased the danger, and whether the appellee was in the exercise of due care. The opinion or belief of the employe that the work might be done with safety, notwithstanding the defect, is not always conclusive on the jury, on the question whether there was any danger or increase of danger on account of such defect.

Where there is a defect in the machinery increasing the danger of the employe, of which defect he complains to the employer and the employer promises to repair the defect, on which promise the employe relies and continues in the employment, he is, for a reasonable time, absolved from the assumption of the risks of such service growing out of the defects, but it is the duty of the employe to use such additional care in proportion to the increased and known dangers as a man of ordinary prudence ought to exercise under the circumstances.

It was essential to a recovery by appellee, to prove that appellant was guilty of negligence, and that such negligence on the part of appellant was the proximate cause of the injury sustained by him, and that appellee was free from fault contributing thereto.

The evidence is not clear and satisfactory to us on

these propositions. There is some evidence, however, in the record tending to prove that the machinery was defective; that appellant, with knowledge of the defect, promised to repair it; that appellee was injured by reason of such defect. We can not say, as a matter of law, under the circumstances disclosed by the evidence, that the inference that the danger was increased by the defect, and that appellee was free from fault contributing to the injury, was not authorized.

It is true that one employing men to operate machinery where belts are used is not required to determine when they shall be tightened or loosened, or to control any such matters of ordinary adjustment. It is the duty of the master to keep the machinery in a mill of this kind in proper repair and in reasonably safe working order. When the belts become loose and the shifters and pulleys refuse to perform their functions, and the employer is notified of the defects and promises to make the necessary repairs, the fact that the omission to remedy the defects occurred through the fault of another servant charged with the duty, can not relieve the employer.

On the theory on which this case was prosecuted, and which there was some evidence tending to sustain, the duty was owed to appellee directly. When attention was called to the defects, appellant promised to make the repairs. As we have before observed, it is not shown that appellee had ever been charged with this duty, and the jury was authorized to draw the inference that the duty would be performed by appellant, and that appellant was not relying on the men operating the planer to cut and shorten the belts and repair the shifter and pulleys in such manner as to make the machinery perform its functions in the proper way.

In the view we take of the case, this court would not be authorized in saying there was no evidence authoriz-

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ing the jury to infer negligence on the part of appellant, and that appellee was free from fault.

In *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39, Judge CORREY says: "The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to inferences which might be fairly drawn from conceded facts." *Kentucky and Indiana Bridge Co. v. McKinney, supra.*

In this court, such reasonable inferences as the jury might have drawn from the evidence considered in the most favorable light in the interest of appellee will not be disturbed.

The sixth reason for a new trial calls in question the correctness of each of the instructions given by the the court. The second instruction is as follows: "That at the time the plaintiff received the alleged injuries the defendant was a corporation and he in its employ, there does not seem to be serious controversy. Then the question arises, were either the belts, pulleys, machines or other appliances out of repair? Was either in an unsafe, or dangerous or defective condition? Was either one out of repair? Was the place in which he was working at the time of the reception of the injuries dangerous or unsafe? If any of the machinery was defective or out of repair or in a dangerous condition, what was it? Which particular piece was unsafe? What, if anything, was unsafe about the premises where the plaintiff was laboring? These are questions for you to answer in forming your verdict. Then, again, if you find any part of the machinery was unsafe or any of the appliances dangerous which directly contributed to the injury complained of, was that fact known to the plaintiff? and if so

known to him, was it known to the defendant or could it, by the exercise of reasonable care, have known of such condition? These are also questions for you to determine."

The theory of the complaint is that the machinery, through improper adjustment and long continued use and wear, had become out of repair, and that by reason of such defects it had become unsafe and dangerous. In other words, that the dangers of the service in which appellee was engaged had been increased by reason of such defects arising out of the failure to repair.

The only question to be determined on this branch of the case was whether the unsafe and dangerous condition of the machinery grew out of the alleged defects. Whether the place in which he was working at the time he was injured was unsafe, or whether the machinery was dangerous, was not a question involved in the case except in so far as the unsafety or danger was the result of the defects growing out of the failure to repair the machinery. The instruction suggests to the jury that among the questions to be considered by them in determining the right of the appellee to recover was whether the place in which he was employed was unsafe or the machinery dangerous. The fact that the place was unsafe or the machinery dangerous did not, under the issues, entitle appellee to recover. There may have been, and perhaps was, more or less danger connected with the service when the machinery was in good working order. The only right of action which appellee could maintain under the circumstances was because of the increased hazards growing out of the defects on account of the failure to keep the machinery in proper repair. Conceding, without deciding, that the other instructions, when considered as an entirety, correctly state the law applicable to the case, we are of the opinion, in

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view of the unsatisfactory character of the evidence on the vital questions involved in the case, that the instruction under consideration was calculated to mislead the jury, and we are not satisfied that such erroneous impression, if created, was removed from the minds of the jury by the other instructions. *City of Lafayette v. Ashby*, 8 Ind. App. 214.

On account of the unusual length of this opinion, we will not consider other questions presented which may not arise on another trial.

Judgment reversed, with instructions to grant a new trial.

Filed Nov. 20, 1894.

DISSENTING OPINION.

Ross, J.—I am unable to concur in the opinion of the majority in holding that the complaint states a cause of action. The majority opinion says that appellant's contention simply relates to the sufficiency of the complaint as alleging negligence against appellant and want of negligence on the part of the appellee. Even were I to admit that appellant's counsel simply insist that the complaint is insufficient because it fails to sufficiently allege negligence on appellant's part, and want of negligence on the part of appellee, I am still of the opinion that the facts alleged fail to show culpable negligence on appellant's part, and do show that appellee was either guilty of contributory negligence, or that his injury was the result of a risk assumed. But I think counsel go further and insist that the mere promise to repair is not sufficient to create the exception to the general rule, which is that a servant who continues to use defective machinery, after he knows of its defective condition, assumes the extra hazard occasioned by the defect.

Counsel in their brief say: "The paragraph then pro-

ceeds to allege that the plaintiff complained of the condition of the machinery described, and that the defendant promised to repair it and then negligently and carelessly failed to keep this promise. We maintain that it is not enough to allege negligence and carelessness in not keeping a promise to repair. * * * The averments should simply have been that the machinery was not repaired within a reasonable time."

As a rule of pleading, the facts alleged must be such as will warrant the court in declaring as a question of law that the defendant was guilty of culpable negligence.

"We suppose it to be clear that when a plaintiff charges a defendant with a negligent breach of duty, he must state facts from which actionable negligence can be inferred, for the general rule is that negligence can not be presumed. This general rule is uniformly applied to employers and employes, and it is presumed that the employer has done his duty. This presumption is, in effect, a *prima facie* case in favor of the employer. To defeat this presumption of duty performed, it is necessary to state facts rebutting the presumption, otherwise there can be no cause of action. A violation of duty must, therefore be shown, otherwise the complaint must be judged to be bad. This is so because culpable negligence can not be presumed in aid of a complaint." *Brazil Block Coal Co. v. Young*, 117 Ind. 520.

A servant, when he engages in the master's service, is presumed to understand the nature and hazard of the employment, and assumes all the ordinary risks and obvious perils incident thereto. The risks thus assumed are such as arise from the service to be performed, whether from the use of certain machinery or from working in a particular place. They are assumed the same, whether they arise from the use of defective machinery or an unsafe place to work, if known to the servant,

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as if arising from reasonably safe machinery or a reasonably safe working place. *Atlas Engine Works v. Randall*, 100 Ind. 293.

All known dangers, whether from defective tools, machinery and appliances, or the unsafe condition of the working place, are incident to the particular work connected with their use, hence are assumed by one engaging to work with them. *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Naylor v. Chicago, etc., R. W. Co.*, 53 Wis. 661.

It is only the known dangers which are so regarded, for the servant is not compelled to seek for latent defects but may rely upon the assumption that the master has furnished machinery, tools, and appliances, as well as a place to work, which are free from latent defects; in other words, that the master has used reasonable care to see that no latent defects exist.

"When a servant enters upon an employment which he knows is hazardous, either by reason of the nature of the employment, or because of defective or otherwise dangerous appliances, he may well be said to assume this risk. Knowing when he solicits and accepts the employment, that if it is given him he must use defective tools, he contracts to take that as one of the risks of the service. Whether anything is said of the dangerous character of the employment, or of the defective and dangerous appliances or not, if the dangers and defects are of such character that they are equally known to or open to the observation of both employer and employe, it can well and justly be said they stand on a common footing. Acceptance of the employment is an acceptance of the attendant risk." *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327.

And, as the Supreme Court of Ohio, in the case of *Columbus, etc., R. R. Co. v. Webb's Admx.*, 12 Ohio St. 475, says:

"Whether the employe seek employment in a machine shop, or on board a steamboat, upon a railroad train, or to pilot rafts over dangerous rapids, to labor in a powder mill, or to serve upon a whale ship, or upon a voyage of discovery in the Arctic regions; in each and all of the several employments and positions chosen, the employe, by entering the service voluntarily, takes upon himself the hazard and dangers properly incident to the service in which he engages; and the employer is in no sense, from the relation they so sustain to each other, a warrantor of the safety of the employe."

Not only does the servant assume the risks naturally arising from the employment, but he also assumes such extraordinary risks as he may knowingly and voluntarily encounter. *Smith v. Winona, etc., R. R. Co.*, 42 Minn. 87, and cases cited.

But where the servant is sent by the master into dangerous places, to work with defective tools, machinery and appliances, or put to dangerous tasks, of the risks of which he is ignorant, it is the duty of the master to give him notice and put him on his guard, so that he may protect himself from injury.

In the case of *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212, a leading case in this country, COOLEY, J., speaking for the court, says: "No railroad company, and no manufacturing or business establishment of any kind, is bound at its peril to make use only of the best implements, the best machinery and the safest methods. The State does not require it, and could not require it, without keeping such minute and constant supervision of private affairs, and interfering with such frequency as under all circumstances would be irritating and damaging, and in many cases would become intolerable. In the main the State must leave every man to manage his own business in his own way. If his way

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is not the best, but nevertheless others, with a full knowledge of what his way is, see fit to coöperate with him in it, the State can not interfere to prevent, nor punish him in damages when the risks his servants voluntarily assume are followed by injuries."

The true rule as we gather it from the adjudicated cases is that a master may use defective and unsafe machinery, tools and appliances in the operation of his business, and those who engage in his service knowing of their defective and unsafe condition, or such defects and unsafeness being open and obvious, assumes the risks incident to their use in such condition. But when the defects or unsafeness is latent and unknown, his assumption of risks is only of such as are incident to their use in their apparent condition. So if they appear to be reasonably safe and free from defects the servant may assume that they are so, and he has a right to rely upon such assumption. The presumption is that the master has performed his duty, and that the machinery, tools and appliances with which the servant is to work are as they appear, and to that extent reasonably safe and suitable for that purpose. The servant has no right to assume that they are safe and suitable if they appear otherwise, for if he undertakes to use them he is presumed to know their condition, so far as it is patent, and to have contracted accordingly, hence if injury befalls him by reason of such defects as were open and visible when he accepted employment, he can not recover therefor, because that was one of the incidents of the service. Where the servant enters into the service of a master knowing that the machinery with which he is to work is unnecessarily dangerous because of its defective condition, he is *prima facie* presumed to know the dangers incident to its use, and he assumes the risks incident to its use in that condition.

"It is for those who enter into the employments of a dangerous character, or who work at dangerous places, to exercise all that care and caution which the nature of the employment or the situation in which they are employed demands." *Cincinnati, etc., R. W. Co. v. Long, Admr.*, 112 Ind. 166.

If the machinery, tools and appliances, or the working place become defective and unsafe for use after his entry into the service, and he knows of their defective and unsafe condition, and remains in the master's service continuing to use them, he thereby assumes the extra hazard occasioned by such defect. *Parke County Coal Co. v. Barth*, 5 Ind. App. 159; *Becker v. Baumgartner*, 5 Ind. App. 576; *Kentucky and Indiana Bridge Co. v. Eastman*, 7 Ind. App. 514; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Louisville, etc., R. W. Co. v. Sandford, Admr.*, 117 Ind. 265; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Pennsylvania Co. v. O'Shaughnessy, Admr.*, 122 Ind. 588; *Rogers v. Leyden*, 127 Ind. 50; *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156; *Ames, Admr., v. Lake Shore, etc., R. W. Co.*, 135 Ind. 363.

"If the danger is known and the servant chooses to remain, he assumes, it would seem, the risk and can not recover. He might leave if he chose, but, choosing to remain, he can not remain at the risk of the master. Every employer has a right to judge for himself how he will carry on his business, and workmen having knowledge of the circumstances must judge for themselves whether they will enter his service, or, having entered, whether they will remain." *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113.

And the Supreme Court of Massachusetts, in a recent

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case, says: "It is a familiar principle, that, if a servant, capable of contracting for himself, and with full notice of the risk he may run, undertakes a hazardous employment, or to put himself in a hazardous position, or to work with defective tools or appliances, no liability is incurred by the master for injuries received from these hazards." *Hatt v. Nay*, 144 Mass. 186, and cases cited.

"The employe has a right, until he acquires knowledge of danger, to act upon the assumption that his employer will use ordinary care to provide safe appliances; but when he becomes fully informed of the danger, he can no longer act upon this assumption. Knowledge puts an end to his right to assume that the master has done his duty." *Indianapolis, etc., R. W. Co. v. Watson*, *supra*.

It is well settled, as a general rule, that while the servant assumes the extra hazard occasioned from known defects, there is an exception to the rule, and with the exception we have to deal in this case. The exception is where the means or appliances are defective and the servant has complained of them, and the master, in answer to such complaints, has promised to make them safe, and the servant relying upon such promise and believing that they have been made safe, continues in the master's employment and to use such means and appliances without having made an inspection to see that the defect has been remedied. The mere fact of the promise will not, as matter of law, entitle the employe to recover.

In the case of *Gowen v. Harley*, 56 Fed. Rep. 973, the court, in speaking of this exception to the general rule, says: "To the last rule there is this exception: If a servant who is aware of a defect in the instruments with which he is furnished notifies the master of such defect, and is induced, by the promise of the latter to remedy it,

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to remain in the service, he does not thereafter assume the risk from such defect until after the master has had a reasonable time to repair it, unless the defect renders the service so imminently dangerous that no prudent person would continue in it."

Judge Wharton, in his work on Negligence (2d ed.), section 220, speaking of the exception, says: "The only ground on which the exception before us can be justified is that in the ordinary course of events the employe, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect."

"A servant can not continue to use a machine he knows to be dangerous, at the risk of his employer," says Pollock, C. B., in *Dynen v. Leach*, 40 Eng. Law and Eq. 491.

Society has an interest in the lives of all its members, and no one has a right to voluntarily cast himself in the way of a known danger.

In actions of this character where an employe seeks to recover damages from his employer for injuries received while in the discharge of his duties, on account of defective machinery, one of two questions ordinarily arises relative to the employe himself, namely:

1st. Was he guilty of contributory negligence?

2d. Was the injury the result of the risk which he assumed?

If he contributed to his own injury, the law affords him no relief, neither can he recover if the injury is the result of a hazard naturally incident to the service.

To determine which of these questions arises under a given state of facts is not always easy of solution. In most of the adjudicated cases no distinction has apparently been drawn between these two classes of cases, and for that reason general rules of law have been an-

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nounced, which, although correctly stated, have no application to the place under consideration. Some courts say that if an employe continues to use defective machinery, knowing its condition, and is injured, he is guilty of contributory negligence; others, however, hold that that is not a question of contributory negligence, but rather whether or not by continuing to use it he assumed the risk. The distinction is forcibly stated in Beach on Con. Neg., section 139, as follows: "Assuming the risks of an employment is one thing, and quite an essentially different thing from incurring an injury through contributory negligence. It is not contributory negligence *per se* to engage in a dangerous occupation. Men may properly and lawfully do work that is essentially dangerous work, or work that is, for some reason or another, more than ordinarily dangerous for the time being, and to contract to do such work is not, in itself, an act of negligence."

A servant may, therefore, know that his work is more than ordinarily dangerous on account of defects in the machinery which he is to use, or the unsafe condition of the place where he is to work, and yet he is not guilty of contributory negligence in doing it. Contributory negligence does not consist in undertaking to do a thing known to be dangerous, but having undertaken it, in failing to use every reasonable precaution to avoid being injured while performing the work.

While it may be almost certain death for a fireman to go into a burning building in an attempt to save life or property, yet if he knows the danger, and accepts the employment, and in the performance of that duty is injured, his right of recovery is not barred because of his contributory negligence, for he may have exercised the highest possible degree of care, but he is barred because the injury was the result of one of the risks assumed by

him. The same may be said with reference to many employments, in the performance of the duties of which the danger is imminent and continuous.

From the facts alleged in the complaint under consideration, it is evident that the defect complained of was open and apparent, and to use the machine in that condition as dangerous at the time appellee was using it, and was injured, as it was when he complained of its condition, and appellant made the promise to repair, the question then arises: Had the appellee a right to close his eyes to the known danger, and assume that he would not be injured simply because the appellant had promised to repair the defect? In other words, can an employe knowingly cast himself in the way of danger, and in the event he is injured, hold his employer answerable therefor, because the employer had promised to remove the danger?

An employe can not encounter a known danger voluntarily, and, if injured, hold his employer to account therefor. *Meador v. Lake Shore, etc., R. W. Co.*, 138 Ind. 290.

It is an old and settled rule of the common law that none can maintain an action for an injury where he has consented or contributed to the act which occasioned it. To him applies the maxim "*volenti non fit injuria.*"

It is firmly settled in this State that in an action brought by an employe against an employer to recover for injuries received on account of defective machinery, the plaintiff shall allege and prove knowledge on the part of the defendant and want of knowledge on his part of the defect complained of. *Kentucky and Indiana Bridge Co. v. Eastman, supra; Evansville, etc., R. R. Co. v. Duel, supra*, and cases cited.

As heretofore stated, there is an exception to this general rule requiring the employe to show that he had no

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knowledge of the defect which caused the injury, when the facts show that he did know of it and complained to his employer and was induced to continue in the service under a promise to remedy the defect. But the facts alleged must be clear and explicit in order to create the exception. They must in themselves create the exception in order to warrant the court in holding that he did continue in the service at the risk of the employer and not at his own risk. The rule absolving the servant from the risk is an exception to the general rule, and to create it facts must be averred showing not only that the master promised to repair, but that the promise was made within a reasonable time prior to the injury, and that the danger from using the machinery in its defective condition was not great or imminent. These are the facts which create the exception, and in order to take the case out of the operation of the general rule these facts must be specially averred, otherwise the general rule must prevail.

When a master lulls his servant into a feeling of security by promising to repair defective machinery, and the servant, ignorant of the failure to repair, uses it in its defective condition and is injured without fault on his part, the master is liable.

It is here alleged that the belt and pulley which operated to raise the crosshead were out of repair, worn and insufficient for that purpose; that the appellee was acquainted with its defective condition, and that it was dangerous to operate it in that condition; that appellee, from time to time until February 20, 1890, the day he was injured, notified appellant of its condition, and appellant promised to repair it, but appellant failed and neglected to do so; that he continued to use it, knowing the repairs had not been made, and on account of its defective condition was injured.

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When appellee alleged that he had complained to the appellant of the dangerous condition of the belt and pulleys, he confessed his knowledge of their defective and dangerous condition, hence the legal presumption arises that if he continued to use them in that condition he assumed the risks incident thereto.

The pivotal question then is: Do the facts alleged create the exception to this general rule?

When a master is notified by his servant of the unsafe or defective condition of the machinery which he has furnished such servant with which to work, it is his duty to make the repairs within a reasonable time, and the servant, unless he can see that the repairs have not been made, has a right to assume, after the lapse of a reasonable time, that the repairs have been made safe. But if the servant remaining in the service continues to use defective machinery, after a reasonable time for making the repairs has elapsed, knowing it has not been repaired, and is then injured on account of the defective condition of the machinery, he can not recover. 14 Am. & Eng. Encyc. of Law, page 356, paragraph 13, and cases cited. And when a servant continues to use the machinery, which he has complained of to his master as being defective and which the master has promised to repair, during the reasonable time allowed the master to make such repairs, if the defect is so glaring and the danger from its use in that condition such that a man of common prudence would not use it, by such continued use he assumes the extra hazard incident thereto, and can not recover for any injury resulting therefrom. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Conroy v. Vulcan Iron Works*, 62 Mo. 35.

Appellee avers in his complaint that he notified appellant and that appellant promised to make the repairs. It is not averred when the notice was given or the prom-

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ise made. To allege that from time to time until the day he was injured he notified the appellant does not advise the court of the time when the notice was given. The right of appellee to recover depends upon the statement of facts, which create an exception to the general rule which we have stated, and in order to do so the facts stated must be such as will warrant the court in inferring negligence.

This is necessary because the law presumes that the master has done his duty, and this presumption must be overcome by the statement of such facts as will show a breach of such duty. *Pennsylvania Co. v. Whitcomb, Admr.*, 111 Ind. 212, and cases cited.

In order that appellee's complaint state a cause of action, it is necessary that the facts alleged overcome two presumptions which naturally arise against him and in favor of the appellant, namely: first, that the appellant was mindful of its duty and performed it, and second, that the appellee, knowing the defective and dangerous condition of the machinery, by continuing to use it assumed the risk.

If the facts alleged fail to overcome either of these presumptions, no cause of action is stated.

In *Indianapolis, etc., R. W. Co. v. Watson, supra*, ELLIOTT, C. J., in speaking for the court, says: "Where there is a promise to repair which induces the employe to continue in the service, then, doubtless, he may, for a reasonable length of time, rely on the promise and continue in the service, unless the danger of continuance, without a removal of the cause of it, is so great that a reasonably prudent man would not assume it. *Hough v. Railway Co.*, 100 U. S. 213; *Loonam v. Brockway*, 3 Rob. (N. Y.) 74; *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99; *Crichton v. Keir*, 1 C. Sess. case (third series) 407.

"Some of the cases go farther and assert that the promise of the employer exonerates the employe entirely, even though the continuance in the service is known to him to be constantly and immediately dangerous. *Fort Wayne, etc., R. R. Co. v. Gildersleeve*, 33 Mich. 133. We are not inclined to adopt this view. Our opinion is, that if the service can not be continued without constant and immediate danger, and the danger and its character are fully known to the employe, he assumes the risk if he continues in the service. It is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well * relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employe must not subject himself to a great and evident danger, since this he can not do without participating in the employe's fault. The community have an interest in such questions, and that interest requires that all persons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death or serious bodily injury sins against the public weal. All must use ordinary care to avoid known and immediate danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop, and he can not pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur." See, also, *Conroy v. Vulcan Iron Works*, *supra*. The

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court in the above case has expressly declared that when danger is imminent it is contributory negligence on the part of the servant to encounter it, even though the master has promised to remove the danger.

I think the learned judge delivering the opinion in that case failed to make the proper distinction, for he, in effect, says that it is contributory negligence for an employe to undertake to perform work when the attendant danger is great or imminent. A man may be employed to descend into the depths of the earth to rescue a fellow-man overcome from damp gas in a coal mine; he may know that to do so subjects him to the greatest peril, and that the danger is so great and imminent that he is the only man who is willing to undertake the task and run the risk, and yet can it be said that he is guilty of contributory negligence simply because he is willing to risk his life in order to save that of a fellow-man? True if we apply the rule that an ordinarily prudent man would not undertake it, we know that judging from what the average man, taken from the ordinary walks of life (the merchant, mechanic, farmer or day laborer), would do, they would not undertake it; nevertheless I do not hesitate to assert that any man whose courage is such that he is willing to brave any danger to save the life of his fellow-man, will not be declared by any court to have been negligent in doing so. To face such a danger is not contributory negligence, but the party undertaking it assumes the risk.

If, however, we accept the other theory, that the servant can not be said to assume the risk by continuing to work with defective machinery under promise of the master to repair, yet he is guilty of contributory negligence if he continues such use when the danger is imminent. True the master is negligent in that he fails to remove the defect as promised, and thus lessen the dan-

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ger to the servant, but the servant is equally negligent if he continues to use machinery which he knows, from its defective condition, will injure him. The negligence which entitles him to recover must be exclusively the master's, and if he contributed thereto he has no right of action. When it is not contributory negligence for the servant to knowingly use defective machinery from the use of which, in that condition, he may assume that injury will not probably result, negligence can not be imputed to the master for failing to repair it. The master is not bound to furnish absolutely safe machinery, but is only to furnish such machinery as is reasonably safe. When it is reasonably safe, the master has done his duty, and the risk of injury then belongs to the servant. If the machinery becomes unsafe and dangerous by reason of defects, the duty of both master and servant are equal, the one to repair and make it reasonably safe, and the other not to use it until such repairs are made. The promise of the master does not mislead the servant unless he is ignorant of the failure to keep it. By such a promise no duty is imposed upon the master of exercising a greater degree of care for the servant's safety than the servant himself is bound to exercise for his own protection. In fact no man is ordinarily prudent who does not exercise a greater degree of care for his own protection than the law exacts from another for his benefit.

Following these and the many other adjudications, I think that a complaint to recover for an injury received on account of defective machinery known to be defective by the servant, is not sufficient unless it is alleged not only that the master promised within a reasonable time prior to the injury to remedy the defect complained of, but that from the continued use of the machinery in its defective condition there was no probable or imminent

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danger. For if, in such condition, that with the utmost skill and care danger was still imminent to one using it, and a servant continued to use it in that condition, he can not be said to be ordinarily prudent.

No prudent man will knowingly place himself in the way of danger.

When the facts alleged show knowledge on the part of the plaintiff of the defects complained of, the law presumes he was negligent if he continued its use in that condition, and the burden, as heretofore stated, was upon him to show that the danger from its use in that condition was not great or imminent. The facts alleged fail to make such a case.

The demurrer should have been sustained to each paragraph of the complaint.

Filed Nov. 20, 1894.

No. 1,325.

THE TRAVELERS' INSURANCE COMPANY v. NITTERHOUSE.

LIFE INSURANCE.—Manner of Death.—Statements in Proofs not Conclusive.—The statements in the proofs of death required by an insurance company, either of fact or opinion as to the manner of death, are not conclusive.

SAME.—Suicide.—Burden of Proof.—Where, in defense of an action upon a policy of life insurance, the insurer pleads suicide as the cause of death, the burden is upon the latter to establish this issue by a fair preponderance of the evidence, not by a *prima facie* case alone, but by such proof as will overthrow all the evidence to the contrary.

SAME.—Presumption Against Suicide.—Doubt as to Cause of Death.—Question for Triers.—Suicide will not be presumed, but on the contrary the presumption is that the death of an insured was not voluntary, and where the evidence leaves the manner of death in doubt, the conclusion reached by the court or jury trying the case will be upheld.

The Travelers' Insurance Company v. Nitterhouse.

SAME.—Shot Wound in Forehead.—Evidence Considered.—For a consideration of evidence showing death by a pistol shot wound in the forehead held sufficient to sustain a finding of accidental death, see opinion.

From the Tippecanoe Circuit Court.

W. D. Wallace and S. P. Baird, for appellant.

A. L. Kumler and T. F. Gaylord, for appellee.

DAVIS, J.—This was an action by the appellee, Matilda Nitterhouse, against the appellant on a policy of insurance for two thousand dollars issued on the life of the appellee's late husband, George Washington Nitterhouse.

It is provided in the policy, a copy of which is filed with the complaint, that it is issued and accepted upon certain express agreements which are declared to be conditions precedent to the contract.

One of the provisions of the second condition is that if the assured, George Washington Nitterhouse, "shall * * * die by suicide, whether the act be voluntary or involuntary, felonious or otherwise, or whether the insured be sane or insane at the time of the act, * * * then this policy shall be null, void and of no effect, except in the cases provided for by the sixth condition of this policy."

In the sixth condition of said policy it is provided that if the insured "shall die by suicide * * * during the continuance of this policy, then the full net value of this policy, per American Experience Table of Mortality and 4½ per cent. interest and no more shall be paid."

The appellant filed an answer in four paragraphs.

The first paragraph of the answer was a general denial.

In the second, third and fourth paragraphs of answer, all of which purported to be but partial answers to the complaint, the appellant averred, in different forms, that the insured came to his death by suicide and prayed that

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appellee should be limited in her recovery to the net value, at the time of her husband's death, of said policy, per American Experience Table of Mortality and $4\frac{1}{2}$ per cent. interest, which the appellant averred (and which the court afterwards found) amounted to \$306.36. •

Appellee filed a reply and the issues thus formed were brought to trial before a jury, beginning March 8, 1893.

At the conclusion of the evidence, by agreement of the parties made in open court, the cause was withdrawn from the consideration of the jury and submitted to the court for trial and final determination in the circuit court upon the evidence then in the record.

On the 11th of March, 1893, the court, after having heard argument of counsel, took the cause under advisement, and, nearly a year thereafter, to wit, on the 2d of February, 1894, it made a special finding of facts, at the request of the appellant, and stated its conclusion of law thereon.

The finding in reference to the manner in which the insured came to his death is as follows:

"Third. The court further finds that at the time of his death said George W. Nitterhouse was 45 years of age, and, by his marriage with the plaintiff, had four children, who survived him, to wit, two daughters aged 17 and 15 years, and two sons aged 12 and 7 years; that on the 27th day of August, 1891, he was injured from a fall, in the left side near the seventh rib, and on the seventh or eighth day of December, 1891, he went, on the advice of his attending physician, who accompanied him, to Chicago, Illinois, where his seventh rib was removed by a surgeon, and the wound sewed up; that he remained in the hospital at Chicago for about three weeks, when he returned to his home at Monon, Indiana, at which time his wound was healed up and was doing well, and on the 13th day of January,

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1892, he believed he was getting along splendidly; that afterwards, and before the 24th day of January, 1892, said wound broke out afresh, and on said 24th day of January, 1892, he was advised by his attending physician to return to Chicago for further treatment, and felt some discouragement then; that he consented, and promised to return to Chicago for such treatment, and afterwards, on the 28th day of January, 1892, he again asserted that he was going to Chicago to obtain treatment for his said injury; that during said month of January he was confined to his home, and was not able to attend to his duties as foreman of the shops of the Louisville, New Albany and Chicago Railway Company, at Monon, other than to keep the books required to be kept by him as such foreman; that he remained in the employment of said railway company, and kept said books at his home up to the day of his death; that on the night before his death he slept well, and in morning ate a hearty breakfast; that said decedent was the owner of a thirty-eight calibre revolver, which was self-cocking, and had five chambers, and when loaded the chambers could not be revolved without raising the hammer; that prior to his said departure to Chicago, said revolver was kept in his drawer at the shops of said railway company; that during his absence at Chicago one of the employes of said company caused said revolver, without the knowledge of the decedent, to be brought to the house of the plaintiff, and it was by her placed in the north upper drawer of a bureau in the bedroom occupied by her daughter in said house, and said drawer was locked; that a day or two before the 30th day of January, 1892, said decedent obtained the key to said drawer, where said revolver was, for the purpose, as he stated, of procuring some letters which belonged to him, and which were kept in said bureau drawer; that afterwards, on the morning of the

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30th of January, 1892, at about 8 o'clock, said decedent went to said room where said revolver was kept as afore-said, and shortly thereafter a pistol shot was heard in said room, and upon persons entering, said George W. Nitterhouse was found lying on his back on the floor, unconscious, and in a dying condition, and with a bullet hole near the center of his forehead; that when he was so found, he held said revolver in his right hand, the last three fingers thereof resting on the handle of said revolver, his index finger on its trigger, his thumb just back of the hammer of said revolver, and his right hand, which held said revolver, was resting on his body, bent in towards the stomach, and the muzzle of said revolver, two chambers of which were empty, was pointing towards his head.

The court further finds that said revolver was a self-cocker, and when loaded could be discharged by simply pulling the trigger, or by cocking the hammer and pulling the trigger; that when the hammer was down it rested between two cartridges, but on raising the hammer, the cylinder containing the cartridges revolved so as to bring in front of, and beneath, the hammer one of said cartridges. The revolver was known as an American Bull Dog of thirty-eight calibre.

The court further finds that there were no powder burns or marks on the face or forehead of the decedent; that some blood escaped from the wound in the forehead; that the skin of the forehead was not removed or denuded except in the space covered by said bullet hole, at and about which there were neither depression nor lividity of the skin; that at the time the pistol was discharged, it was not in the immediate contact with the face or forehead of the deceased; that it was so far distant from the forehead of the decedent that no powder marks could be made on the forehead or face of the deceased; that

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prior to the death of the decedent, he in no way or manner expressed any desire or purpose of committing suicide, and at and prior thereto he was and had been living on the most affectionate terms with all the members of his family.

The court further finds that said decedent came to his death by accidentally shooting himself with said revolver, near the middle of the forehead, the bullet therefrom making a slightly downward course and going nearly through his head; that just before said revolver was discharged, the decedent was holding it in his right hand with his index finger on the trigger."

The appellant thereafter filed a written motion and reasons for a new trial. The first cause assigned for a new trial is that the special finding of facts is not sustained by sufficient evidence. The court overruled the motion, appellant reserved the proper exception, judgment was rendered in favor of appellee for \$2,199.30, and appellant, within the time allowed, filed a bill of exceptions containing the evidence.

The error relied on for a reversal is that the court below erred in overruling appellant's motion for a new trial.

The contention of counsel for appellant is that Nitterhouse died by suicide, and that the finding of the court that he died by accident is wholly unsupported by the evidence.

The appellant alleges in an affirmative answer that the insured came to his death by suicide. The issue thus made placed the burden upon the appellant to satisfy the trial court, by a fair preponderance of proof, of the truth of this defense. *Home Benefit Assn. v. Sargent*, 142 U. S. 691; *Phillips v. Louisiana Equitable Life Ins. Co.*, 21 Amer. Rep. 549.

On the trial appellee read in evidence the certificate of

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the attending physician, who states therein that in his opinion the insured committed suicide. Appellant introduced in evidence the coroner's verdict, which finds that the insured committed suicide. Also, appellant read in evidence a letter written by appellee in which she says that the insured, while temporarily insane, shot himself.

Counsel for appellant insist that all the evidence is confirmatory of, and none of it is antagonistic to, the statement of the physician constituting a part of the proof of loss, that the insured came to his death by suicide.

This is not the vital question presented for our consideration. The real question we are called upon to determine is whether all the evidence establishes, without controversy, the fact that the insured committed suicide. The burden was upon appellant to establish this issue to the satisfaction of the trial court by a fair preponderance of the evidence, and this appellant was required to do, not by a *prima facie* case alone, but by such proof as would withstand and overthrow all of the evidence to the contrary. *Carver v. Carver*, 97 Ind. 497 (511.)

The statements in the proofs of death, either of facts or of opinion, are not conclusive. *Bachmeyer v. Mutual Reserve Fund Life Assn.*, 52 N. W. Rep. 101; *Home Benefit Assn. v. Sargent*, *supra*.

This court can not disturb the finding of the trial court unless there is an entire absence of evidence tending to support some material point in issue.

We will now refer to some of the facts disclosed by the evidence: It appears that Nitterhouse had money and friends, a wife and four children; that his domestic relations were pleasant, and that he was sober and industrious. There was nothing shown in the previous history of his life to warrant the assertion that he came to

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his death by suicide. No reason existed for taking his own life, unless his injury, suffering and the despondency incident thereto can be assigned as such reason. During the whole time of his sickness, not a murmur is shown to have escaped his lips. He never complained of his condition. The pistol which he held in his hands at the time of his death was his own, and had been kept at the shop where he worked. In the absence of Nitterhouse in Chicago in December the pistol or revolver was brought or sent to the house where he lived, and was taken by Mrs. Nitterhouse and placed in a bureau drawer and locked up. Her husband knew nothing of the revolver being in the house. Some two or three days before his death he made inquiry of his wife as to where the key to the drawer was, as he was anxious to get possession of some business letters in said locked drawer. She informed him of the place where the key was kept, but whether he went to the drawer at this time is unknown.

On the night before his death he slept well, and in the morning he partook of a hearty breakfast. The two daughters, Helen and Mary, slept in the front bed-room up stairs, in which room the father that morning met his death. Soon after the deceased had risen from the breakfast table, and while Helen was still in her bed-room, her father, as she testifies, "came up stairs and brought me my clothes, and told me to hurry and get dressed and go down and get the kitchen cleaned up." Mrs. Nitterhouse testifies that this occurred while Mr. Newbold, who had called to see her husband, was in the sitting-room, and that as Helen's clothes had been left there the night before, she could not come down for them.

Helen says she was down stairs within five minutes after her father's visit to her room, and, as she passed

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into the kitchen, she saw her father in the sitting-room, but says nothing about seeing Mr. Newbold there. This was the last time she saw her father alive. Within five minutes after that (at about eight o'clock) the report of a pistol was heard in the bed-room just vacated by the daughter, and the father was found, by those rushing in, on his back upon the floor in front of the mirror, with the bullet hole in his forehead and in the condition described in the special finding. No one was present when he was shot. Nothing is known as to whether he was shot accidentally or otherwise, except as may be inferred from the facts and circumstances.

Dr. Clayton, who saw the body the next day, testified in reference to the appearance, size and location of the hole in the forehead, as follows:

"Q. Did you examine the wound? A. No, sir; I just went in and looked at him, was all.

"Q. Did you see the hole in his head? A. Yes, sir, I did.

"Q. Did you examine the wound to see what direction the ball took? A. No, sir.

"Q. Did you examine the back of the head? A. No sir.

"Q. You may state the appearance and size of the hole, and about where it was. A. It was about the center of the forehead, or near so.

"Q. How much above the nose and eye? A. Well, I should think about midway, about the center of the forehead.

"Q. You may state how large the hole was. A. Well, it looked like it was produced by about a thirty-two caliber revolver, may be larger than that; I am not experienced and can't say the size."

Dr. Sampson, the coroner, testified as follows:

"Q. You may describe the appearance of the hole in

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the forehead, if you observed it, how large it was and what its appearance was. A. Well, it was very large; about the size that a thirty-caliber bullet would make, naturally going through the skull and it had discolored the skin a little bit."

Robert Gray says: "I think the skin was burned a little if I remember right, I won't say positive."

"Q. I will ask you to state, Mr. Gray, if you saw any marks upon the forehead or face of Nitterhouse that indicated powder burns. A. No, sir."

Counsel for appellant insist:

1. That the undisputed facts in the case exclude the possibility of any kind of an accident.

2. The fact that there were no powder marks upon his face proves conclusively that the muzzle of the revolver, when the pistol was discharged, was in close contact with his forehead, and that therefore the shooting was intentional.

It should be remembered in this connection that the statements in the physician's certificate and in the coroner's verdict that the insured committed suicide, and in the letter of appellee that the insured, while temporarily insane, shot himself, are merely the expression of opinions and were not in the court below and are not here in any sense conclusive. It should also be borne in mind that so strong is the instinctive love of life and so uniform the efforts of men to preserve their existence that suicide can not be presumed. The presumption is that the death of the insured was not voluntary. *Waycott v. Metropolitan Life Ins. Co.*, 24 Atlantic Rep. 992.

In such cases where the proofs of death and the entire evidence introduced on the trial leave it in doubt how the death of the insured was caused, the question must be determined by the jury or trial court. *Home Benefit Assn. v. Sargent*, *supra*.

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In the last case cited the court says: "But the defendant was not prejudiced by the statements and opinions contained in the proofs of death, and the plaintiff was not estopped thereby, as a matter of law. When the court was asked to charge the jury that by the introduction of those proofs the burden was shifted, the evidence was all before the jury, and was much more full and complete than that upon which Dr. Jenkins had based his opinion. He himself had been examined as a witness, and had testified, to what he knew or did not know at the time he made his certificate, and all the facts of the case, so far as they were known, had been explained in view of the contents of the proofs of death. It appeared that most of the statements in the certificate of Dr. Jenkins were based on hearsay. * * * The jury were entirely at liberty to properly find that that wound, although self-inflicted, was accidental."

In *Phillips v. Louisiana Equitable Life Ins. Co.*, *supra*, the court says: "Did the insured die by his own hand? The onus of proof is on the party who affirms this fact. And we do not think it has been legally proved. It is true that the witnesses who testify as to his death express it as their opinion that he killed himself or committed suicide; but their opinion can not be regarded as evidence of the fact. Nor do the facts and circumstances proved point to the voluntary self-destruction of the insured to the exclusion of all other reasonable hypotheses. All the facts and circumstances proved in regard to his death, are that he retired to his room at bedtime and about one o'clock at night the report of a pistol was heard. When the inmates of the house came to the room, the insured was found in a reclining posture on the sofa, and a pistol was lying on the floor near by. He had been shot in the mouth. It is possible that he might have shot himself accidentally. * * * The evidence

being circumstantial only, proves nothing, since it does not exclude all other reasonable hypotheses."

In our opinion, the absence of the powder marks upon his face, in the light of the other facts and circumstances in the case, do not show conclusively that the muzzle of the revolver when discharged was in close contact with his forehead and that the shooting was intentional.

We quote from section 287, vol. 3 (4th ed.), Wharton and Stille's Medical Jurisprudence, as follows: "Gun-shot wounds present striking differences in their appearance, according to the distance at which the piece was fired, and the number and character of the projectiles. If exploded in immediate contact with the body, the wound is large and circular, the skin denuded, blackened and burned, and the point at which the ball entered is livid and depressed. The blackened and burned appearance of the skin is due to the imperfect combustion of the grains of powder."

If the piece is held near, but not in immediate contact with the body, the authors say: "The eyebrows, lashes and lids were completely burned, and a large number of grains of powder had imbedded themselves in the cheek. Experiments being made in order to determine the distance required to produce these effects, it was found that the weapon must have been held within a foot's distance." Wharton and Stille's Medical Jurisprudence, section 287, vol. 3 (4th ed.).

In the case under consideration, the conditions either as to "contact" or "near" wounds are not clearly shown to exist. His face and forehead did not present the appearance described by the authorities. The evidence tended to prove that there were no powder marks or burns about his face. The wound, as to appearance and size, seems to have been natural, and the skin at the point of entry was not livid and depressed.

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In our judgment, from these facts and circumstances and all the other facts and circumstances disclosed by the evidence, the trial court was authorized in drawing the inference, not only that the revolver was held at a distance when fired, but also that the shooting was accidental and not intentional.

We find no reversible error in the record.

Judgment affirmed.

Filed Nov. 23, 1894.

No. 1,162.

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COUNTY.—*Claim Against.*—*Filing With Board of Commissioners.*—*Independent Action.*—*Time of Bringing.*—Before an action can be maintained in the circuit court on a claim against a county, such claim must first be presented to the board of commissioners for allowance or rejection, but the time fixed for taking an appeal from an order disallowing the claim is not a limitation upon the independent action.

SAME.—*Damages.*—*Negligence.*—*Defective Bridge.*—*Notice to County.*—*Complaint.*—A complaint against a county to recover for injuries sustained by the breaking down of a public bridge, not alleged to have been defectively constructed, must, to be good on demurrer, show that the county had notice that the bridge was unsafe a sufficient time prior to the accident to enable it to make the necessary repairs.

PLEADING.—*Demurrer to Answer.*—*Carrying Back to Complaint.*—*Aid from Verdict.*—A demurrer to an answer should be carried back and sustained to a bad complaint to which the answer is addressed, and upon appeal the sufficiency of the complaint will be considered in the same way as if a demurrer had been directed against it, without any aid from the verdict.

From the Gibson Circuit Court.

L. C. Embree and F. P. Leonard, for appellant.

S. R. Hornbrook, for appellee.

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REINHARD, J.—The appellee sued the appellant, in the Posey Circuit Court, for damages alleged to have been sustained by him from a personal injury received by falling through a bridge while attempting to cross the same with a traction engine.

To the complaint, which is in one paragraph, the appellant filed an answer in two paragraphs, the first of which is a general denial.

In the second paragraph of the answer the appellant averred that on the 1st day of September, 1890, the appellee filed his claim for damages for the identical injuries sued for in this action, with the board of commissioners of Posey county, who, upon due consideration, disallowed the same and entered their judgment of disallowance in the proper records of said board, and that appellee has never appealed from said judgment, and did not commence this or any other action until more than sixty days after the rendition and entering of said judgment.

A general demurrer addressed to this paragraph of the answer was sustained by the court, and an exception entered.

The venue of the cause was at this point in the proceedings changed to the court below, where there was a trial by a jury and a verdict in favor of appellee. Over the appellant's motion for a new trial and in arrest of judgment, the court rendered judgment on the verdict.

In this court the appellant has assigned errors as follows:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The court erred in overruling the motion in arrest of judgment.
3. The court erred in not carrying the demurrer to the

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second paragraph of the answer back to the complaint, and in not sustaining the same to the complaint.

4. The court erred in sustaining the demurrer to the second paragraph of the answer.

5. The court erred in overruling the motion for a new trial.

Without regard to the order in which the foregoing errors are assigned, we proceed to determine such of them as may be necessary to a correct disposition of the case.

In the first place, we may say that we are of opinion that the court correctly concluded that the second paragraph of the answer was bad. It is true that under the law all claims against a county must be presented for allowance or rejection to the board of commissioners before an action can be maintained thereon in the circuit court. *Bass Foundry and Machine Works v. Board, etc.*, 115 Ind. 234; *Board, etc., v. Creviston, Admr.*, 133 Ind. 39.

When any such claim has been presented and disallowed, in whole or in part, the claimant may take an appeal to the circuit court within thirty days. R. S. 1894, section 7858.

This is a remedy given him by the statute, if he feels himself aggrieved by the action of such board. But it is not his only remedy. He may waive his right to an appeal entirely, and proceed against the county by complaint and summons in the circuit or superior court. This action is in no sense a part of the same proceeding had before the board in the presentation and rejection of the claim, but is wholly separate and independent thereof. The presentation of the claim before the board is a condition precedent to the right to maintain a suit upon the claim, but the new action is not a continuation of such proceeding. The filing of the claim with the board

is in the nature of a demand upon such board to pay such claim.

We are unable to agree with appellant's counsel that the new action, if resorted to, must be brought within the time prescribed for taking an appeal from the decision of the board. No authority is cited in support of such a construction and we know of none.

The position that the statute requiring the claimant to first present his claim to the board for allowance or rejection is one of limitation is not tenable. The statute requiring such claim to be presented to the board prior to the commencement of a suit therefor contains no such restriction as is here contended for. R. S. 1894, section 7856.

If it had been the intention to limit the institution of independent actions upon such claims to thirty days after their rejection by the board, we can conceive of no useful purpose that could be subserved by allowing such an action as this to be brought at all, for it would give the claimant no better or even materially different remedy than that of the appeal. If it be said that he would thus be enabled to pursue his remedy without being required to file an appeal bond, we reply that if this was the only object sought to be accomplished, the Legislature could easily have provided that an appeal might be taken by the claimant without filing a bond. But we do not think the purpose of the act which requires such claims to be presented to the proper board by the claimant before he can maintain an action upon the same was to limit the time within which such actions must be commenced, but to enable the county to avoid expensive litigation, or the costs and annoyance of a lawsuit, by affording the board an opportunity to discharge or settle the claim, if found correct, without such suit. *Bass Foundry and Machine Works v. Board, etc., supra.*

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It simply casts upon the claimant the duty of making a demand of the board and meeting with a refusal, in an official way, before he will be allowed to institute an action on his claim.

Having reached the conclusion that the court committed no error in sustaining the demurrer to the second paragraph of the answer, let us next inquire whether the demurrer should have been carried back to the complaint and sustained to it. This is the question raised by the third specification of error, and necessarily involves the determination of the sufficiency of the complaint.

That a complaint may be tested by a demurrer to the answer as well as by a demurrer addressed to the complaint directly, there can be no doubt under the authorities. A demurrer searches the entire record within its range. This embraces not only the pleading to which it is addressed, but every other pleading antecedent to it, and which is affected or influenced by the pleading demurred to, and it becomes the duty of the court, in such an instance, to sustain the demurrer to the first bad pleading found in the record preceding the demurrer. This proposition, we think, is fully supported by the cases in our own State. *Haymond v. Saucer*, 84 Ind. 3; *Gould v. Steyer*, 75 Ind. 50; *Ætna Ins. Co. etc., v. Baker*, 71 Ind. 102; *Batty v. Fout*, 54 Ind. 482; *Nelson v. Blakey*, 47 Ind. 38; *Kretsch v. Helm*, 45 Ind. 438; *Hain v. North Western Gravel Road Co.*, 41 Ind. 196; *Lytle v. Lytle*, 37 Ind. 281; *Menifee v. Clark*, 35 Ind. 304.

Nor can a pleading which would be obnoxious to a demurrer addressed to it in the first instance meet with a better fate when the demurrer is addressed to a subsequent pleading, and carried back to the first defective one. The complaint here can no more be aided by the verdict than if it had been assailed by a demurrer coming

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from the defendant, and addressed to the complaint itself, for in either event the pleading is attacked by demurrer, and if the demurrer be erroneously overruled the error occurred before there was any verdict, and it can not be held that the defect is waived by failure to demur. As was said by the Supreme Court in *Meniffee v. Clark, supra*, where a demurrer had been filed to a bad reply but not carried back and sustained to a bad answer: "If the demurrer be interposed at a later stage of the pleading, the objection is taken by the demurrer just as effectually as if it was addressed to the answer, and put on file by the plaintiff. The demurrer brings in review the whole series of pleading in all its preceding stages, and the court must give judgment against the party who has committed the first available fault. This was the well known practice or rule of pleading in use at the time of adopting the code; it has been held to apply, under the code, with reference to a defective complaint, even where the demurrer is to the reply, and we see no reason for a different rule with reference to a defective answer."

Was the complaint sufficient to withstand the demurrer? The manifest theory of the pleading is that the appellee is entitled to recover for the appellant's negligence in failing to repair a defective bridge, with notice of the defect.

The averments of the complaint upon the question of appellant's negligence are, "*that at the time of said accident said bridge was unfit for public use; that the timbers and materials thereof were, and for a long time had been weak, defective, and out of repair, and were not of sufficient strength to enable the traveling public to pass over the same without serious risk, peril and danger, which weakness, defect and unsafe condition were to the de-*

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fendant made known before the bridge broke down, and were to the plaintiff wholly unknown.”

Had the complaint charged that the weakness and defect of the materials were owing to defective or negligent construction of the bridge in the inception, possibly the complaint would be good without an averment of notice. Or had the complaint in terms charged notice or knowledge on the part of the appellant, without limiting it to the time “before the bridge broke down,” such averment might be supported by proof that the bridge was so defective and for such a length of time that the appellant became chargeable with knowledge or notice. But here the appellee recognizes the necessity of averring some notice to the county, as the other averments are not sufficient to show that the appellant was bound to take cognizance of the defects. Unfortunately, however, the allegation of the notice is insufficient in failing to show that it had been given or that the unsafe condition of the bridge had been brought to the knowledge of the appellant a sufficient length of time before the accident to have enabled it to make the necessary repairs. For aught the complaint avers, the notice may have been given or the knowledge received on the same day on which the accident happened. We regard this omission as fatal to the complaint. See *Town of Monticello v. Kennard*, 7 Ind. App. 135, and authorities there cited on the question of notice. Doubtless the learned court that passed upon the demurrer to the answer did not have its attention specifically directed to this vice in the complaint. But under the well-established rules which require the demurrer to be carried back and applied to the complaint to which the answer is directed, we have but one duty to perform and that is to reverse the judgment, with directions to the court below to carry the demurrer back to the complaint and to sustain it to the complaint.

Nor do we think we are relieved of that duty by the authority of *Fuller v. Cox*, 135 Ind. 46, which the appellee's learned counsel cites in support of the position, that although the complaint was defective the defect was cured by the verdict. We do not think it was intended by that case to establish a rule to the effect that although a demurrer to a complaint has been erroneously overruled the error may be cured by the verdict or finding, and the opinion in the official reports will make this more clearly to appear. In the present case, however, the verdict in nowise tends to cure the defect in the complaint, even if the rule contended for were to obtain. The jury, with their general verdict, returned answers to several interrogatories. In these it is found in substance that the bridge was defective *at the time of the injury*, and it is further found by the jury that the evidence failed to show the length of time of such defective condition. To the interrogatory whether the board had any notice of the defective condition of the bridge prior to the time of the injury, the simple answer is "yes," and in no other answer is it indicated or found how long before the injury the appellant had such knowledge or notice. In the view of the record most favorable to the appellant, it is not made to appear that the appellant had either actual or constructive notice of the condition of the bridge for a sufficient length of time prior to the accident to have enabled it to prevent the injury. There was no special finding, therefore, which can be said to have cured the defect in the complaint.

Judgment reversed.

Filed March 28, 1894; petition for rehearing overruled Nov. 27, 1894.

No. 1,234.

McFARLAND v. SWIHART.

PARTITION FENCE.—Of Barbed Wire.—Negligently Constructed.—Damages to Stock on Adjoining Premises.—Constructing a barbed wire partition fence in such improper manner that stock of another lawfully pasturing in adjoining premises become entangled in the wires by reason of the improper construction thereof, and is killed, amounts to actionable negligence, for which damages may be recovered.

SAME.—Negligent Construction.—Anticipated Injury.—In such case, the injuries inflicted were such as any prudent man should have foreseen in the exercise of ordinary care.

SAME.—Notice by Injured Party, of Condition of Fence.—In the face of an averment by the injured party that he was without fault, he can not be charged with notice of the negligent manner in which the fence was constructed and maintained.

From the Randolph Circuit Court.

A. J. Stakebake, for appellant.

J. S. Engle, for appellee.

DAVIS, J.—The material allegations in appellee's complaint are that it was the duty of the appellant to construct and maintain one end or half of a certain partition fence between the appellant's land and the land of one Brane, and that the said appellant constructed said fence and maintained the same in such a negligent and careless manner that the same was dangerous, in this, that the posts set in the ground for the support of the wires were too far apart to support the wires properly; that on said posts were strung six barbed wires with sharp barbs about four inches apart on said wires; that said posts were so negligently put in the ground that they were insufficient to keep the wires at a proper tension, and the said wires were not tightened and drawn into proper tension; that the top wire of said fence was

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four feet and four inches from the ground, and the second wire from the top was eighteen inches from the top wire, and the third from the top was eleven inches below the second wire, at the points where the several wires were fastened to the posts, and that the wires were allowed to sag on account of not being sufficiently taut, and because of the insufficiency of the posts as aforesaid; that the said wires thus armed with the said sharp barbs, so loosely arranged and strung on said posts at such a distance from each other, were a trap and a menace to horses, etc., coming in contact therewith, and were dangerous to horses, etc.; that said barbed wires on said fence sagged down and swung loosely on the posts thereof, and the space between the said barbed wires at the top of said fence, on account of the negligent manner in which the fence was constructed, was from eighteen to twenty-four inches; that horses, etc., coming in contact therewith could easily put their heads through said fence between the barbed wires, and on account of the sagged and loose condition of the barbed wires, horses, cattle and other stock could easily put their heads over said fence, and such stock were inclined to do so in coming in contact therewith, and would attempt to cross over the same, and in so crossing would become entangled in the said barbed wires, etc.; that said appellee was the owner of a certain horse, of the value of one hundred dollars, and that he hired pasture for said horse of said Mahlon Brane, and the said horse was turned on said pasture in an adjacent field belonging to said Brane, which was separated by said fence so negligently constructed and maintained by appellant, and that said horse, while so pasturing in said field, came in contact with said barbed-wire fence, and undertook to cross over the same, and in so attempting to cross became entangled in said barbed wires and was cut, lacerated, and wounded

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thereby and had his throat cut by and on said barbed wires in said entanglement, and was then and there and thereby killed, without the fault or negligence of appellee, to his damage, etc.

The court overruled a demurrer to the complaint, and this ruling presents the only question for our consideration.

The complaint is founded on the alleged careless and negligent construction and maintenance of the partition fence against and on which appellee's horse was killed. The grievance is not that the appellant erected and maintained a barbed wire fence on the line dividing his land from his neighbor's land, but that such fence was so carelessly and negligently constructed and maintained that it was a breach of duty he owed to said neighbor and all persons who might lawfully use the adjoining land. The complaint does not rest on the theory that the erection of a barbed wire fence is necessarily a tort, but it is predicated on the fact that the fence in question was so constructed as to be dangerous to horses, etc., depasturing on the adjoining premises. Although erecting a barbed wire fence is not of itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. In other words, a thing may not be dangerous *per se* if properly constructed, but it may be dangerous if improperly and negligently constructed. The duty owing by appellant was to any one who might lawfully depasture or turn stock on the premises adjoining the said fence, and the duty was owing from the appellant to the owner of the horse. It is true, the complaint is not a model pleading, but, in our opinion, it is sufficient to withstand the demurrer under the rule enunciated in *Sisk v. Crump*, 112 Ind. 504.

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We think the injury done in this case to appellee's horse, as shown by the averments in the complaint, was the natural and probable consequence of the negligent construction and maintenance of the fence by appellant which any prudent man should have foreseen in the exercise of ordinary care.

Counsel for appellant insist that appellee was guilty of contributory negligence because he was bound to know the kind and condition of the fencing that constituted a part of the enclosed field in which his horse was being pastured. There is no rule of law that would charge appellee, in the face of the averment that he was without fault, with notice of the careless and negligent manner in which the fence was constructed and maintained by appellant. If appellee was without fault, he did not have such notice of appellant's negligence as would, as a matter of law, charge him with contributory negligence. If it appeared as a fact that appellee voluntarily turned his horse into this field with knowledge of the defective, negligent and dangerous condition of the fence, a different question would be presented.

Whether such question would be one of law to be determined by the court or one of fact to be determined by the jury under the circumstances of the particular case, we need not now decide.

Judgment affirmed.

Filed Nov. 2, 1894.

Buck v. The Pennsylvania Company.

No. 1,342.

BUCK v. THE PENNSYLVANIA COMPANY.

EVIDENCE.—*Repetition of Question.—Rejection.*—The following question: "How much wheat, if you know, was delivered to your firm out of cars Nos. 439 and 1889 each from Buck," was properly rejected where the witness had previously stated that he only saw a part of the wheat weighed, and that he could not say how many bushels were in the cars.

SAME.—*Memorandum of Weights Made by Different Persons.*—There was no error in refusing to admit in evidence a copy of the memorandum of the weights of wagon loads of wheat put in the cars, where the memorandum was made by different persons.

From the Knox Circuit Court.

W. A. Cullop and C. B. Kissenger, for appellant.

S. M. Chambers and S. O. Pickens, for appellee.

LOTZ, C. J.—The appellant prosecuted this action in the court below to recover damages for wheat alleged to have been lost in the transportation of the same from Bruceville, a station on appellee's road, to the city of Vincennes.

The contention of appellant was that he placed on appellee's cars for shipment five thousand bushels of wheat, and that appellee only delivered at the point of destination about forty-six hundred bushels.

The only assignment of error discussed by appellant's counsel is that of the overruling of the motion for a new trial.

It appears, from the evidence, that a portion of the wheat was loaded and shipped in two cars, one of which was numbered 439, and the other numbered 1889. The appellant sought to show that there was a less quantity of wheat in these two cars when they reached their destination than when they were loaded.

The appellant called as a witness one of the members

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of the firm to which the wheat had been consigned, and propounded this question: "How much wheat, if you know, was delivered to your firm out of cars Nos. 439 and 1889 each, from Buck?"

The court sustained an objection to this question. This ruling is one of the causes for a new trial. There was no error in this, for the witness had previously stated that he only saw a part of the wheat weighed, and that he could not say how many bushels were in cars numbered 439 and 1889.

Another cause for a new trial is based upon the refusal of the court to permit the appellant to read in evidence a memorandum of the weights of the wagon loads of wheat put in the cars at Bruceville. The original memorandum was made by different persons, and only a copy of it was produced on the trial. There was no error in excluding it. The memorandum is not found in the bill of exceptions.

The appellant also complains of the instructions given to the jury by the court. It is insisted that the instructions are so lengthy and cover so many questions of law not germane to the issue or evidence that they were confusing and misleading, and actually did mislead the jury. It is true the charges are lengthy, but we think they fairly state the law, and are not misleading.

Judgment affirmed, at costs of appellant.

Filed Nov. 21, 1894.

The Elwood Planing Mill Company v. Jackson, by Next Friend.

No. 1,505.

THE ELWOOD PLANING MILL CO. v. JACKSON, BY NEXT FRIEND.

PLEADING.—*Complaint.*—*Negligence.*—*Master and Servant.*—*Servant of Tender Years and Inexperience.*—*Hazardous Work.*—A complaint for personal injury is sufficient which alleges, in substance, that plaintiff is a boy fifteen years of age, that he was employed to work in and about defendant's mill to wheel sawdust and to clean out shavings and cuttings; that the foreman and president of the defendant company took plaintiff from his usual and customary work and set him to work upon the universal wood-worker, a machine highly dangerous to use and operate, and rendered more dangerous on account of its construction; that appellee was inexperienced and ignorant of the dangerous character of the machine while in operation, because of its rapid motion; and that he was set to work while it was in motion, and while working with the first piece of timber was injured by reason of the manner in which the machine was set.

APPELLATE COURT PRACTICE.—*Preponderance of Evidence.*—*When Determined, when Not.*—The appellate tribunal will not weigh the evidence to determine which side has the preponderance, unless all the evidence is documentary, in which case the appellate tribunal would stand upon an equal footing with the trial court.

SAME.—*Waiver of Question.*—Errors assigned but not discussed are waived, and will not be considered.

INSTRUCTIONS TO JURY.—*Repetition.*—The court is not compelled to repeat its instructions.

From the Madison Circuit Court.

C. M. Greenlee, G. M. Ballard and E. B. Goodykoonts,
for appellant.

D. C. Chipman, M. A. Chipman, S. P. Moore and F. A. Walker, for appellee.

Ross, J.—Appellee sued and recovered judgment in the court below for injuries received while in appellant's service.

The facts, as we gather them from the complaint, are that the appellee, a boy between fourteen and fifteen

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years of age, was employed by appellant to work in and about its mill to wheel sawdust from the mill and to clean out shavings and cuttings; that George W. Burk, foreman and president of appellant's company, took him from his usual and customary work and set him to work upon the universal wood-worker, a machine highly dangerous to use and operate, and made more dangerous on account of its being set too deep and too wide apart; that appellee was young and inexperienced, was ignorant of the dangerous character of the machine while in operation, because of its rapid motion; that he was set to work while it was in motion, and while working with the first piece of timber was injured by reason of the drawing down of the timber caused by the deep and wide setting of the machine.

Counsel urge against the sufficiency of the complaint that it is not sufficiently alleged that appellee was taken from his usual occupation and set to work to perform duties more hazardous; that it does not state who put him to performing this extra hazardous work, and that it fails to allege that appellant did not instruct him properly, make him familiar with the work, and caution him with reference to the danger of operating such a machine.

We deem it unnecessary to set the complaint out in this opinion, but suffice it to say we have read it with great care, and considered it with reference to each of the objections urged, and find that it states a good cause of action.

Counsel, after referring to the well settled rule that this court can not weigh the evidence and determine which side has the preponderance, say: "The evidence in the cause does not sufficiently sustain the verdict of the jury, for the reason that it fails to establish by a preponderance of evidence the fact of the negligence of the

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appellant, which was charged in the complaint as the cause of the injury."

Although the evidence in this case to sustain a finding of negligence against the appellant is so very meager and unsatisfactory that were this court sitting as a trial court it would feel called upon to set aside the verdict and grant a new trial, as a court of review it can not consider the weight of the evidence, as the trial court could, and determine upon which side it preponderates. That is for the trial court to do, and while this court may think the trial court has not decided according to the preponderance of the evidence its decision is final when there is any evidence to sustain the verdict. The reasons for the rule are that all questions of fact being for the jury to determine from a preponderance of the evidence subject to review by the trial court, and the jury having considered it with reference to any conflicts that might exist therein, as well as the weight to be given to each particular part thereof, on account of its source or the manner in which the witnesses appeared and testified, and after thus having considered it and agreed upon which side it preponderated, and the judge trying the case has given such decision of the jury his approval, this court ought not to set it aside when it can not get before it the evidence in the same manner in which it was given to the jury and trial court.

For, as BIDDLE, J., in *Cox v. State*, 49 Ind. 568, says: "It must be remembered that such evidence comes before us merely in written words; while the court and jury trying the cause have it from the living voice, with whatever peculiar accent, emphasis, or intonation it may have; and that they see the witness, his countenance, looks, expression of face, manner, readiness or reluctance, and the many nameless indices of truth or falsehood, which it is impossible to put in words. A state-

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ment of facts in words, though testified to by different witnesses, of various degrees of credibility, comes to us with the same weight, while to the court and jury their weight would be, in some instances, the full import of the words, and in others scarcely worth consideration. Hence it is that the credibility of a witness is a question solely for the jury, they being the triers of facts; and the presumption in this court must be that they understand their duty, and performed it. And, should they fail to * * understand their duty, the court that presides over them has a far better opportunity to correct their errors than it is possible for us to have, who sit merely as a court of appeals; and when the verdict of the jury has received the approval of the court below, and the sole question in the case is the weight of evidence to sustain it, we lay our hands upon the judgment with great reluctance."

We do not mean to say that a case can not arise where this court will not review the evidence and determine which side has a preponderance, for if a case should arise where all of the evidence is documentary, and a jury should decide in favor of the party against whom it would appear that the evidence clearly preponderated, this court would stand upon an equal footing with the trial court and jury, and would review their decision, and if it felt that the verdict was contrary to the preponderance of the evidence, would grant a new trial. *Nichols v. Glover*, 41 Ind. 24 (34).

In this case the evidence is not of that character, hence we can not review it.

The fourth reason for a new trial is: "The court erred in giving to the jury instructions numbered one, two, three and four as asked by the plaintiff."

No argument has been advanced in support of coun-

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sel's objection to these instructions, hence we will not consider them.

It is next urged that the court erred in refusing to give to the jury instructions numbered nine and fifteen of those tendered by the appellant.

Both of these instructions, so far as applicable to the evidence in the case, were fully covered by instructions given. To have given them would simply have been to repeat to the jury what had already been told them. The court is not compelled to repeat its instructions.

There may be material error in the record, but, if so, it has not been presented, and this court can not search for errors upon which to reverse the judgment.

Judgment affirmed.

Filed Nov. 14, 1894.

No. 1,279.

EVERETT v. FARRELL.

CONTRACT.—Abandonment.—What Amounts to.—Loan Agent and Borrower.—The notification by a loan agent to one proposing to borrow money, that he is unable to procure the loan, and advised the borrower to look elsewhere for the money, which he did, amounts to a mutual abandonment of the contract relating to the loan, and is binding upon both the loan agent and the borrower.

HARMLESS ERROR.—Overruling Demurrer to Answer.—Any error that may have been committed in overruling a demurrer to a paragraph of answer is harmless, where no relief was given under such paragraph.

From the Allen Circuit Court.

C. W. Kuhne and T. E. Ellison, for appellant.

J. Morris, R. C. Bell, J. M. Barrett and S. L. Morris, for appellee.

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REINHARD, J.—The complaint filed by appellant in the court below is in two paragraphs. The first is based upon the following writing, denominated "Exhibit A.:"
"To Charles E. Everett, Loan Agent, Fort Wayne, Ind.

"DEAR SIR: I have this day made application for a loan of \$600, through your loan agency, on the following property, to wit: (Here follows a description of the property.)

"I hereby authorize you to have prepared for me an abstract of the title to said lands, and to prepare and place of record in said county any affidavits, exhibits, deeds showings or other writings required to render the same satisfactory to you. I agree with you to pay your abstractor for his services, and to refund to him his expenses in the premises and with attorney's fees. I further agree to accept said loan if ready to close within thirty days after said title has been rendered satisfactory as aforesaid. And in addition to the above payments I further agree that in case I refuse to accept and close said loan within ten days after you have mailed notice to my address, that the loan is ready to be closed, I will pay you for your services in procuring said loan a sum equal to ten per cent. of the amount of the approved loan, without relief from valuation and appraisement laws, and with attorney's fees.

"(Sig.)

AUSTIN FARRELL."

No date is stated in the contract, but it is alleged in the complaint, that it was entered into on the 31st day of December, 1891.

In addition to the services rendered in procuring the loan, appellant avers that he employed abstractors to procure an abstract, and that he paid \$12 for the same, and that a reasonable attorney's fee is \$50.

The amended second paragraph of the complaint makes this alleged contract a part of the same, and alleges per-

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formance of everything necessary to be done to entitle the appellant to relief. It avers the procuring of the abstract at an expense of \$12; that a reasonable attorney's fee for collecting said \$12 is \$50, the same as in the first paragraph. Then it sets forth, in addition thereto, another contract, applying for a loan in the Union Central Life Insurance Company, designating the application as "Exhibit B." This portion of the second paragraph the court, on motion of appellee's counsel, struck out; so that the complaint, though in two paragraphs, was practically upon the alleged written contract set forth in the first paragraph of the complaint alone.

The appellee filed an answer in five paragraphs. Demurrers having been sustained to the 2d, 3d and 4th paragraphs of the answer, amended 2d and 6th paragraphs were filed. The first paragraph of the answer was a general denial. Demurrers were overruled to the amended 2d and 6th and to the 5th paragraphs, and a reply in two paragraphs closed the issues. A trial by jury resulted in a verdict for the appellee, the defendant below, and upon this verdict, over appellant's motion for a new trial, the court rendered judgment.

The appellant has assigned the following errors:

1. "The court erred in overruling the appellant's demurrer to the appellee's fifth and amended second paragraph of answer."

2. "The court erred in overruling the demurrer to the sixth paragraph of answer or cross-complaint."

3. "The court erred in overruling the motion for a new trial."

The first assignment being joint can only be sustained if both the fifth and amended second paragraphs of answer are insufficient. If either paragraph states a good defense the first assignment must fail. *Williamson v.*

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Brandenberg, 6 Ind. App. 97; *DeVay v. Dunlap*, 7 Ind. App. 690.

The amended second paragraph of the answer, in substance, is, that as to so much of the complaint as seeks to recover for procuring the loan, it admits the execution of the paper sued on and avers that one Dr. Noble was the agent of the appellant; that said contract was made with the said Dr. Noble, as such agent, on the 21st day of December, 1891; that no time is mentioned in the contract for its performance; that appellee told said Noble, when said paper was made out, that he desired to have the money proposed to be borrowed to pay off an indebtedness of \$600, which would mature on the 23d day of January, 1892, and that unless he could procure the loan by that time he could not and would not use or take it; that it was then and there agreed between appellant and appellee that appellee would not be obliged to take the loan or pay any commission unless the appellant procured such loan before the 25th day of January, 1892; that it was agreed that the time elapsing between the execution of the contract and said 25th day of January, 1892, would be a reasonable time for the performance of the contract on the part of appellant; that the appellee relied upon this understanding and executed the writing.

It is then alleged that the appellant failed to procure the loan within the time thus agreed upon, and through his agent Noble so informed the appellee, and stated to him that appellant could not procure said loan, and that appellee would better look elsewhere for the money; that relying upon this statement the appellee acted upon it, and was compelled to and did procure a loan, elsewhere so as to meet his said indebtedness on the 26th day of January, 1892.

It is insisted by appellant's counsel that the agree-

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ment in parol set forth in this paragraph of the answer is void, for the reason that it is an attempt to modify or change, by an oral agreement, the written contract entered into between the parties.

The appellee urges, on the other hand, that as the written contract was silent as to the time within which it was to be performed, the parties were at liberty to make any agreement they chose to make upon this subject, without violating the terms of the written contract.

Without deciding the question as to whether such an agreement would contravene the provisions of the writing, it is enough to say that in our judgment the answer is sufficient in any event. It is averred therein that appellant through his agent Noble, informed appellee that he was unable to procure the loan, and advised appellee to look elsewhere for the money, which he did. This was a mutual abandonment of the contract, and was binding upon both the appellant and the appellee. As between the appellant and appellee, they had a clear right to do this; and if the company's rights were in any way impaired or affected by such an arrangement, this will not create any liability in favor of the appellant. There was no error in overruling the demurrer to this paragraph.

This paragraph of the answer being sufficient, it is not necessary to determine as to the sufficiency of the fifth paragraph.

The sixth paragraph of the answer or cross-complaint contains averments showing a mistake of facts between the parties regarding the execution of the contract, and prays a reformation. No relief seems to have been given under this paragraph, and whether the demurrer was properly overruled or not can, therefore, be of no consequence, as such an error would be a harmless one, at

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most. We may say, however, that we regard the paragraph as sufficient.

The last error assigned is the overruling of the motion for a new trial. We have examined the evidence, and think it fully supports the verdict.

Some rulings as to the admission and rejection of evidence, and the giving and refusal of instructions, are relied upon as erroneous. We have examined these questions, and our conclusion is that the result of the trial is so manifestly just and equitable that it should not be disturbed on account of any intervening errors of the character indicated, even if such had been committed.

We have found no substantial error for which we feel authorized to reverse the judgment.

Judgment affirmed.

Filed Nov. 23, 1894.

No. 1,225.

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ASSIGNMENT OF ERRORS.—*Joint Assignment.*—Where an assignment of error challenges all the rulings on demurrer jointly, and not severally, it can not be sustained unless the ruling in each instance was erroneous.

LIBEL.—*Injury to Business or Profession.*—*Complaint, Necessary Averment.*—In an action for libel for an injury to one's profession or business, the business or profession should be pleaded as a substantive and traversable fact.

From the Montgomery Circuit Court.

H. D. VanCleave and I. M. Davis, for appellant.

A. D. Thomas, for appellees.

GAVIN, J.—The appellant's complaint was in four

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paragraphs, to each of which the separate and several demurrers of the defendants, the appellees, were sustained with proper exceptions.

The correctness of these rulings is presented to us by two assignments of error, each of which asserts as the cause of error the sustaining of the demurrer to "the 1st, 2d, 3d and fourth paragraphs of the complaint."

This assignment can only be sustained by showing that all of the paragraphs were good. The assignment challenges all the rulings jointly, and not each severally. *Noe v. Roll*, 134 Ind. 115.

There is no claim made by counsel for the appellant that the first paragraph of the complaint is good, and we are satisfied that it is clearly bad. The appeal can not, therefore, be sustained. We may add, however, that we have examined the other paragraphs of the complaint, and are well satisfied that the court did not err in sustaining the demurrers to all of them.

The strongest of them falls short of making a case in appellant's behalf. It is not insisted that the words charged are such as would ordinarily be libelous. If a recovery is sought because of injury to one in his profession or business, the business or profession should be pleaded as a substantive and traversable fact. *Pollock v. Hastings*, 88 Ind 248.

The pleading in question contains no allegation whatever as to appellant's profession or business.

Judgment affirmed.

Filed Nov. 21, 1894.

No. 1,185.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
COMPANY v. MUSHRUSH.

CONTRIBUTORY NEGLIGENCE.—Parent and Child.—Is Child Twelve Years Old Sui Juris?—Law and Fact.—Railroad Depot.—The court can not say, as a matter of law, that a boy twelve years old is incapable of taking care of himself at a depot, such question is for the jury to determine.

SAME.—Walking Close to Moving Train.—It was not necessarily negligence for such boy to walk slowly along the station platform, within a foot and a half of the train moving at the rate of two miles an hour.

SAME.—Trespasser.—Depot Platform.—Nor was he necessarily a trespasser because he failed to leave the platform and take the shortest route home.

SAME.—General Averment.—When not Overcome by Specific Facts.—It is not enough to overthrow the general allegation of freedom from contributory negligence that the specific facts fail to show want of negligence.

RAILROAD.—Duty as to Passenger Depot and Platform.—To Whom Extends.—It is the duty of a railroad company to keep its station and platform in a reasonably safe condition, and to have them reasonably well lighted. Such duty is not limited to actual passengers only, but includes those who come to meet friends or "speed the parting guest."

DAMAGES.—Excessive.—When Sufficient Data.—It being shown by the evidence that the deceased was nearly twelve years old, a healthy boy, ordinarily bright and intelligent, who had gone to school, learned to read and write and cipher, was a good boy to work and help do chores about the house, run errands and feed the stock, there are sufficient data to enable the jury, by the aid of the ordinary every day knowledge presumably common to every man, to assess not only nominal damages, but reasonable substantial damages for the loss of the boy's services until twenty-one.

EVIDENCE.—Physician and Patient.—When Privilege Attaches.—Physician Employed by Railroad Company.—The knowledge acquired from a patient by a physician while treating the patient is confidential; and the fact that the physician was employed and paid by the defendant railroad company does not prevent the privilege from attaching when the relation of physician and patient actually exists.

The New York, Chicago and St. Louis Railroad Co. v. Mushrush.

From the Porter Circuit Court.

J. Morris, R. C. Bell, J. M. Barrett and S. L. Morris,
for appellant.

P. Crumpacker and E. D. Crumpacker, for appellee.

GAVIN, J.—The appellee sued to recover damages for the death of his minor son, who went to the depot to meet his sister who was expected to arrive on a train due at Hammond about seven o'clock in the evening. As the train was starting, the boy, while walking along the platform, stumbled and fell over some blocks and other obstructions upon the platform which he could not and did not see, and was thrown under the wheels of the car and killed. It is alleged that all this happened without any fault or negligence upon the part of the appellee or his son, and by reason of the negligence of the appellant in carelessly and negligently permitting said obstructions to be upon said platform, and failing to have the platform properly and sufficiently lighted.

The learned counsel for appellant urge the insufficiency of the complaint, which was tested by demurrer. They claim, with apparent earnestness, that because the boy is shown by the complaint to have been only twelve years old he must, in the absence of any specific averment upon that subject, be deemed to have lacked sufficient judgment and discretion to go upon this mission, and that therefore the appellee was negligent in sending him, notwithstanding the general allegation that he was without fault. This court certainly can not say, as a matter of law, that a boy twelve years old is incapable of taking care of himself at a depot. It was at the most for the jury to determine. *Terre Haute, etc., R. W. Co. v. Tappenbeck*, 9 Ind. App. 422.

It is also urged that in other particulars the specific

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facts set forth fail to show the exercise of due care upon the part of both father and son.

The rule is now well settled that the general allegation of want of negligence is sufficient unless the facts set forth affirmatively show negligence. It is not enough to overthrow the general averment that such specific facts fail to show want of negligence. *Board, etc. v. Leviston*, 133 Ind. 39; *Evansville, etc., R. W. Co. v. Athon*, 6 Ind. App. 295.

We do not think there can be any doubt as to the sufficiency of the complaint.

Error is also assigned in this court upon the overruling of the motion for a new trial.

The evidence in the case is in some respects confused and unsatisfactory and in its material features absolutely in conflict. There is testimony to show that the platform was 150 or 200 feet long; that it was only lighted by the light shining from the car windows; that this left it so dark that objects on the platform near the cars could not be seen. There is also testimony that they could be plainly seen. There is evidence that blocks and chips and other stuff, left over from building the platform, were upon it at the point where the boy fell, both at that time and also about one hour and twenty minutes afterwards. There is evidence on the other hand that the platform was entirely free from any obstructions.

Some witnesses testify that the boy was walking slowly along on the platform near the car and toward his home when he stumbled and fell; one says he was going in just the opposite direction; others testify that he was jumping on and off the car steps and missed his hold and fell.

It was peculiarly the province of the jury, under the supervision of the trial court, to determine which of these conflicting accounts of the occurrence was the true one.

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An examination of the evidence convinces us that the conclusion reached by the jury was not unsustained by the evidence. We can not, therefore, disturb it. *Marion Street R. R. Co. v. Carr*, 10 Ind. App. 200, and cases cited.

We can not regard as tenable the position taken, that it was necessarily negligence for the boy to walk slowly along the station platform within a foot and a half of the train moving at the rate of two miles an hour. The case of *Chicago, etc., R. W. Co. v. Fisher*, 55 Am. and Eng. R. R. Cases 223, does not sustain the position. Nor can we regard him as necessarily a trespasser because he failed to leave the platform and take the shortest route home. *Keefe v. Boston, etc., R. R. Co.*, 142 Mass. 251.

It was the duty of the appellant to keep its station and station platform in a reasonably safe condition and to have them reasonably well lighted. For a negligent failure to do this it was answerable to its passengers. *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583; *Pennsylvania Co. v. Marion*, 123 Ind. 415.

Nor is this duty limited to actual passengers only, but it includes those who come to meet friends or see them safely off, or, as aptly expressed, "to welcome the coming or speed the parting guest." 2 Woods R. W. Law, section 310, pp. 1334 and 1335 and notes; *Pierce on Railroads* 275; *Hamilton v. Texas, etc., R. W. Co.*, 64 Tex. 251; *Louisville, etc., R. R. Co. v. Berry*, 88 Ky. 222; *McKone v. Michigan Cent. R. R. Co.*, 51 Mich. 601; *Doss v. Missouri, etc., R. R. Co.*, 59 Mo. 27.

The verdict of the jury allowed \$1,000 damages. It is insisted that this is excessive because there was no proof touching the value, present and prospective, of the boy's services. It was shown by the evidence that the deceased was nearly twelve years old, a healthy boy, ordi-

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narly bright and intelligent, who had gone to school, learned to read, write and cipher, was a good boy to work and helped do chores about the house, run errands and feed the stock. These facts, under the authorities, furnished sufficient data to enable the jury, by the aid of the ordinary, every-day knowledge presumably common to every man, to assess not only nominal but reasonable substantial damages for the loss of his services until twenty-one.

The only authority cited by appellant's counsel to sustain their position upon this point is *Houston, etc., R. W. Co. v. Cowser*, 57 Tex. 293. The rule laid down in that case is with reference to the necessity of proving the wages earned by an adult who was at the time working for wages. The court expressly distinguishes that case from one where the subject of consideration was the value of the future services of a minor of tender years, not engaged in service for hire, which they leave undetermined.

Potter v. Chicago, etc., R. W. Co., 21 Wis. 377, is precisely in point. In that case the child was eleven years and eight months old, strong and healthy, bright and intelligent, had been to school and Sunday-school, was a good child to work and accustomed to help her mother. In response to a claim similar to that made here, the court said, after reciting the above facts: "This is all, and it is sufficient on which to base a verdict for any reasonable sum for loss of the services of the deceased during her minority."

To the same effect is *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445.

Other cases also sustain the principle on which our holding is based. *City of Chicago v. Major*, 18 Ill. 349; *Houghkirk v. President, etc.*, 92 N. Y. 219; *City of Chicago v. Scholten*, 75 Ill. 468; *City of Chicago v. Hesing*, 83

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Ill. 204; *Cooper v. Lake Shore, etc., R. W. Co.*, 66 Mich. 261; *Union Pacific R. W. Co. v. Dunden*, 37 Kan. 1; *Nagel v. Missouri Pacific R. W. Co.*, 75 Mo. 653; *Parsons v. Missouri Pacific R. W. Co.*, 94 Mo. 286.

In some of these cases evidence of the actual ability of the child was held admissible to enhance the amount of recovery.

In *Rajnowski v. Detroit, etc., R. R. Co.*, 74 Mich. 20, evidence of the value of the boy's services until his majority was held admissible not to control, but to aid the jury in arriving at a just conclusion.

There was no error in excluding the testimony of the attending physician concerning statements made by the deceased as to the manner in which the accident occurred, the statement being made in answer to his question, after the boy had been removed to his home. The knowledge acquired by a physician from his patient, while treating the patient, is confidential, and the law forbids that he should reveal it unless the privilege be waived. *Pennsylvania Co. v. Marion, supra*; *Heuston v. Simpson*, 115 Ind. 62.

The fact that the physician was employed and paid by the railroad company does not prevent the privilege from attaching when the relation of physician and patient actually exists. Under the cases of *Louisville, etc., R. R. Co. v. Berry*, 9 Ind. App. 63, and *Citizens' Street R. R. Co. etc., v. Stoddard*, 10 Ind. App. 278, the evidence would seem to have been improper in itself.

The evidence of witnesses as to the presence of obstructions on the platform near the place of the accident, an hour and twenty or thirty minutes after the accident, was admissible. It certainly tended to corroborate upon this point the witness Zwizzig, who testified to the presence of these obstructions at the time of the accident.

The instructions given upon the measure of damages

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are identical with those approved by our Supreme Court in *Louisville, etc., R. W. Co. v. Rush*, 127 Ind. 545.

Counsel urge that the case should be overruled. We do not, however, feel justified in so recommending.

Neither was there any error in overruling appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. There are between the general verdict and these answers no such inconsistencies as would enable the special answers to control the general verdict.

We have now considered all the questions argued by counsel, and have found no cause which would justify a reversal. The record is in peculiar shape, being in much the same condition as was that in *Gray v. Singer*, 137 Ind. 257.

Judgment affirmed.

Ross, J., absent.

Filed June 7, 1894.

ON PETITION FOR A REHEARING.

GAVIN, J.—Counsel for appellant earnestly seek a rehearing. Their first insistence is that there is an entire failure of evidence. The learned counsel are too familiar with the decisions of this court and the Supreme Court not to know that the question thus presented to us is simply whether there is any evidence fairly sustaining the verdict. If there is, the marshaling of a large amount of evidence to the contrary will not in this court overthrow it.

Counsel argue that there was no obstruction on the platform. It is true several witnesses testify that they saw none, and some that there absolutely was none. Yet Zwizzig testifies that both he and his partner stumbled over them just before the accident, and when asked: "Q. What was on the platform?" answered, "A. What

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I can feel by me feet, they got some nails and pieces of plank."

This fits into the evidence of Steel and others who say the obstructions were there a short time after the accident. We would have no right to disregard this evidence and take as true that quoted by counsel, which says there was no obstruction on the platform. It is needless to argue the preponderance of the evidence, because this court does not deal with that question.

Counsel further insist that the deceased was guilty of contributory negligence because he was running alongside a moving train. Zwizzig, however, says he was walking. We have read his evidence over several times in a vain effort to find any statement by him that the boy was running, as claimed by counsel. Furthermore, John Timberlake says that when the boy fell he was "about fifteen feet (away) walking north towards me * * * slow speed."

This contention of counsel must, therefore, necessarily fail.

Further complaint is made that we did not pass explicitly upon the correctness of instruction No. 15, asked by appellant.

It is well settled that an instruction must correctly state the law or there is no error in refusing it. That this instruction did not correctly state the basis upon which the damages were to be estimated was necessarily involved in the determination that the instruction given was the law.

This fact seemed to be recognized by counsel in arguing together both the refusal to give the one and the giving of the other.

The petition is overruled.

Filed Nov. 23, 1894.

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Tague v. Owens et al.

No. 1,352.

TAGUE v. OWENS ET AL.

PLEADING.—Filing Amended Paragraph—Effect of.—If a paragraph of a pleading be amended the amended paragraph supersedes the original paragraph, and when the original paragraph goes out of the record by the filing of the amended paragraph, all the rulings concerning it also go out with it.

APPELLATE COURT PRACTICE.—Record.—Motion to Strike Out Special Verdict.—If the record does not show that a motion to strike out a special verdict is in the record, nor that it was in writing, nor that it, together with the court's ruling thereon, was made a part of the record by order of the court, no question is presented.

VERDICT.—Receiving General Verdict.—Special Verdict Requested.—When Reversible Error.—Practice.—When a special verdict has been requested, the party requesting it should object to the court's receiving a general verdict, otherwise the right to have a special verdict returned is waived. And if the court receives the general verdict notwithstanding such objection, and proper exception is saved, it will be reversible error.

From the Monroe Circuit Court.

J. R. East and *R. G. Miller*, for appellant.

R. A. Fulk and *E. Corr*, for appellees.

ROSS, J.—This is the second time this case has been in this court, 3 Ind. App. 245. On the former appeal the cause was reversed for an error of the court in sustaining a demurrer to the second paragraph of the reply to Jacob Tague's answer.

The first error assigned on this appeal is that the court erred in overruling the demurrer to the second paragraph of the reply.

The record shows that after the reversal by this court of the former judgment, the court below overruled the demurrer of the appellant to the second paragraph of the reply of appellee Owens, which reply had been held to be sufficient by this court. Subsequent to this ruling of the court the appellee Owens amended his reply.

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The amended second paragraph of the reply superseded and took the place of the original paragraph, and any ruling of the court in relation to the sufficiency of the original paragraph is not properly in the record.

When the original paragraph went out of the record by the filing of the amended paragraph, all the rulings concerning it also went out with it.

No demurrer was filed to the amended reply, hence no question is raised as to its sufficiency on this appeal.

Counsel also insist that the court erred in overruling their motion to strike out the special verdict of the jury. Motions of this character, in order to present any questions on appeal, must be in writing and brought into the record, with the court's rulings thereon, either by bill of exceptions or by order of the court. The motion in this case, if in writing, is not in the record, at least we have been unable to find it. Neither do we find any order of the court or bill of exceptions making it, together with the court's ruling thereon, a part of the record.

The third error assigned is that the court erred in overruling appellant's motion for a new trial.

The fourth reason assigned in the motion for a new trial is as follows: "Because the court erred in refusing to strike out the verdict in this cause, because the jury returned a general verdict instead of a special verdict."

If a party request a special verdict, it is the duty of the court to instruct the jury to return such a verdict. Section 555, R. S. 1894.

Although a party has requested that the jury return a special verdict, and they return a general verdict which is accepted by the court, in the presence of counsel, and no objection is interposed, the refusal to return a special verdict can not be reviewed, as counsel seek to have it done in this case. By the failure to object to the court's

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receiving the general verdict, the parties waived the right to have a special verdict returned.

When a special verdict has been requested, the party requesting it should object to the court's receiving a general verdict; and when objection is made, if the court nevertheless accepts the general verdict, and the objecting party properly saves his exception to the court's rulings, it will be reversible error.

No question concerning the regularity of the court's acts or rulings in accepting the verdict is presented by the record in this case, hence will not be considered.

Without setting out the evidence or referring to the witnesses who testify concerning the questions in controversy, suffice it to say that the evidence is sufficient to sustain the verdict. That there is great conflict in the evidence on many questions is clear. The jury having decided which evidence is true and which not, their decision will not be reviewed by this court.

Judgment affirmed.

Filed Nov. 1, 1894.

No. 1,364.

HAYMOND, ADMINISTRATOR, v. BLEDSOE.

HUSBAND AND WIFE.—*Use of Wife's Separate Estate by Husband with Wife's Consent.—Trust.*—If the husband, with the wife's consent, use money belonging to the wife as part of her separate estate, in his business and for support of his family, without any understanding as to whether the same was a loan or a gift, it will be presumed that, as to such money, the husband is the trustee of the wife, and the husband or his estate is liable to the wife for such money.

From the Pulaski Circuit Court.

W. Spangler and J. M. Spangler, for appellant.

J. C. Nye, for appellee.

Haymond, Administrator, v. Bledsoe.

Ross, J.—The judgment appealed from was rendered upon an account filed by the appellee against the estate of John T. Bledsoe.

The facts, as found by the court, are as follows:

“That John Bledsoe died intestate some time in 1892; that he left the plaintiff, his widow, surviving, and several children of a former wife and of the plaintiff surviving him; That William C. Haymond is the administrator of his estate; that the plaintiff and the decedent intermarried about the year 1858; that the plaintiff had been previously married and had children by such first marriage; that upon the settlement of her first husband’s estate, and after her marriage with the decedent, and along for several years, she received various sums of money, both from the estates of her deceased husband and father, amounting, in the aggregate, to about \$600; that upon the receipt of such several sums of money she allowed the decedent to take and use the same in his business and for support of his family without any understanding as to whether the same was a loan or gift; that at the time of this marriage with the plaintiff the decedent was not in very good circumstances financially, but that up to the time of his death he had accumulated property to the amount of about \$4,000, after the payment of the debts of his estate; that the plaintiff and the decedent lived together as husband and wife up to the time of his death, with their children.”

Upon these facts the court concluded: “That the decedent received the \$600 as trustee for his wife, the plaintiff, and that the estate of the decedent is liable to her therefor, with interest thereon from March 28, 1893, the date of the filing of the claim.”

The errors assigned are:

“1st. That the court erred in the conclusions of law stated upon the special findings of facts.

"2d. That the court erred in overruling the appellant's motion for a new trial."

There is no conflict in the evidence, and its tendency is to establish all of the facts found by the court.

Counsel for the appellant insist that when appellee turned the money over to her husband it was in the nature of a gift, and for that reason no right of action exists in her favor for its recovery.

In support of this contention, counsel cite us to Perry on Trusts (3d ed.), section 666, where the author says: "If the husband uses the wife's property in his business for the support of his family, with her knowledge and consent, a gift may be inferred."

It will be noticed that the learned author does not say that when the husband uses the wife's property in his business for the support of his family, with her consent, a gift is inferred, but only that it may or may not be inferred, according to the attending facts and circumstances.

In *Bristor, Admx., v. Bristor*, 93 Ind. 281, the court says: "It has long been the rule of the courts that where the husband, with the knowledge and consent of the wife, applied the income arising from her separate estate to the benefit of the family, no charge could accrue against him, in the absence * * of an understanding or agreement on his part to repay her."

As an abstract proposition of law, the above quotation from Perry on Trusts may be true, but it is surely subject to limitation in its application. Much depends upon the facts and circumstances of each particular case, hence it is almost impossible to announce a rule applicable to every case. The trend of the more recent cases is that on account of the peculiar relation existing between husband and wife, the inference which naturally arises from a transfer of her separate property to him is to create a

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trust, and if a gift was intended the onus is upon the party seeking to uphold it.

For, as MITCHELL, J., in *Armacost, Admr., v. Lindley, Admr.*, 116 Ind. 295, says: "Transactions between husband and wife are presumably influenced by the peculiar relation which exists between them, and where a husband obtains possession of the separate money or property of his wife, it must appear from all the circumstances that the wife intended to make a gift of it to him."

While it is true, as stated in *Bristor, Admx., v. Bristor, supra*, that when a husband receives and applies the income arising from his wife's estate to the support and maintenance of their family, with her knowledge and consent, she can not recover the same back from him in the absence of an understanding or agreement on his part to repay her, yet the rule is different when he receives and uses the principal of her separate estate. This distinction is clearly made in many of our cases. *Parrett, Admr., v. Palmer*, 8 Ind. App. 356; *Hileman, Admr., v. Hileman*, 85 Ind. 1; *Denny, Exrs., v. Denny*, 123 Ind. 240.

Following these cases, which we think are decisive of the questions involved in this case, the judgment will have to be affirmed.

Judgment affirmed.

Filed Nov. 2, 1894.

No. 1,276.

SHEETS v. JOYNER.

LEASE.—*Landlord and Tenant.*—*General Covenant, When Not Limited by Subsequent Special Covenant.*—Immediately after the description of the premises in a lease is the following: "And I will warrant and defend his possession thereto, together with the rights, privilege and appurtenances to the same belonging, to have and to hold the same," etc.; and then after the agreement to pay rent, etc., it proceeds:

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"Whereas, the minor children of the said S—— have an interest in the lot herein leased, said S—— hereby agrees to indemnify said B—— and save him harmless from any right or claim they have or may assert in said premises during the lease." The two covenants are not in any degree inconsistent, nor is there anything to indicate an intention that the latter and special covenant shall limit the former and general covenant.

SAME.—Evidence.—Admission of Partition Proceedings—Eviction—Damages.—In an action by the assignee of the above lease against the lessor for damages on account of having been evicted by a paramount title, from the real estate leased, the partition proceedings to which the lessor was a party were admissible in evidence to show the paramount title by which the tenant was evicted.

SAME.—Evidence.—Judgment in Ejectment Proceedings.—Eviction.—The judgment against the tenant in ejectment proceedings was admissible to aid in showing eviction by claim of paramount title; but such judgment was not evidence, against the lessor, of paramount title.

SAME.—Evidence.—Knowledge by Lessor of Ejectment Proceedings Against Tenant.—Mere knowledge of the ejectment suit by the lessor, acquired by some other source than by notification from the tenant, would not cause her to be bound by the results when she did not in any manner appear therein nor participate in the defense.

SAME.—Evidence.—Judgments Rendered Subsequent to Commencement of Action.—Judgments rendered sixty days or more after the commencement of the suit for damages were not competent evidence.

SAME.—Evidence.—Damages.—Value of Unexpired Term.—The value of the lease for the unexpired term was proper to be considered in estimating damages for the eviction.

From the Madison Circuit Court.

W. A. Kittinger and L. M. Schwinn, for appellant.

D. W. Wood, for appellee.

GAVIN, J.—The appellee, in his complaint, sought to recover damages on account of having been evicted by a paramount title, from real estate leased by appellant to one Bickham, who assigned the lease to appellee.

Immediately following the description of the premises in the lease is the following: "And I will warrant and defend his possession thereto, together with the rights, privileges and appurtenances to the same belonging, to

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have and to hold the same for and during the term of ten years from the first day of March, 1885."

Then appears the agreement to pay rent, together with various other provisions, and then the lease proceeds: "Whereas, the minor children of the said Sheets have an interest in the lot herein leased, said Sheets hereby agrees to indemnify said Bickham, and save him harmless from any right or claim they have or may assert in said premises during the lease."

Counsel contend that this latter and special covenant controls and limits the general covenant for quiet enjoyment which precedes it. We do not so construe it.

In Rawle on Cov. for Title the rule is laid down thus: Section 291. "Second. But where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or unless the covenants be inconsistent."

There is nothing in this lease to indicate any intention of limiting the general covenant nor are the two covenants in any degree inconsistent. The two covenants do not appear to be in any way connected in the lease, differing in this respect from those in *Jackson v. Green*, 112 Ind. 341.

It is the law that general words will sometimes be restrained and confined to what the parties plainly intended. *Burns v. Singer Mfg. Co.*, 87 Ind. 540.

The appellant filed a motion for a new trial, based upon twenty-six causes, most of which relate to the admission of evidence. We will not undertake to pass upon these in detail. Many of the objections are formal, rather than substantial, and are not likely to arise again in the same form.

The facts shown by the evidence, briefly stated, are that in ——— 1885 appellant leased seventy-two feet of ground

to Bickham, his assigns, etc., for ten years, with the privilege of erecting buildings thereon and removing them within a reasonable time after the expiration of the lease. He assigned the lease to appellee, who sublet parts of it. Buildings were erected upon it. In 1892 the three children of appellant commenced suit against her for partition of this and other grounds alleged to be owned by them as tenants in common, appellee not being a party to the suit. Judgment in partition was rendered and the seventy-two feet divided into three portions and assigned to the three children severally. On February 9, 1893, Christina Guenthensperberger, one of the children, recovered judgment in ejectment against appellee for her portion of the ground. On February 10, 1893, this suit was commenced, the complaint alleging that the three children had entered suits against the appellee for the recovery of the possession of said realty and for damages, and that such proceedings were had as that on February 9, 1893, he was ejected therefrom, and the plaintiffs therein recovered judgment for \$300 damages. On April 2, 1893, appellee moved out of the building occupied by him, they being on Christina's portion of the lot, and on April 10 moved the building off. The other buildings had been put up by sub-tenants, who arranged with the children for their remaining. In May, 1892, the children notified the sub-tenants not to pay rent to appellee. Part of them paid none after that time.

We can see no error in receiving in evidence the partition proceedings to which appellant was a party. It was at least one link in the chain of evidence by which the paramount title was to be shown.

The judgment in favor of Christina Guenthensperberger was properly received in evidence to aid in proving the eviction under her claim of title. *Rhode v. Green*, 26

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Ind. 83. Its adjudication of title, however, was not binding upon the appellant, and it was therefore necessary for appellee to prove that her title was paramount, by other evidence.

The mere knowledge of the suit, acquired by appellant from some source other than by notification from appellee, would not cause her to be bound by its results when she did not in any manner appear therein nor participate in the defense. *Walton v. Cox*, 67 Ind. 164; *Morgan, Exrs., v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544.

None of these cases hold explicitly that mere knowledge is not sufficient, but all seem to recognize that something more is required.

Thus, in *Walton v. Cox, supra*, it is held that the grantor was not bound because his grantee had not given him notice.

In *Morgan v. Muldoon, supra*, it is decided that the judgment is conclusive upon the grantor if "properly notified," and in *Bever v. North, supra*, if the grantee "duly notifies" him.

In *Somers v. Schmidt*, 24 Wis. 417, the question is directly and expressly decided in accordance with our holding.

Rawle on Cov. for title, sections 119-125, discusses the authorities and states this conclusion: "The notice must be distinct and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit." Had she actually appeared and made defense in name of appellee, then she would have been concluded by the judgment. *Worley, Admr., v. Hineman*, 6 Ind. App. 240.

While the judgment in favor of Christina was properly received in evidence, it having been rendered Feb-

ruary 9, 1893, we are unable to find any rule of law which would justify the admission of the two judgments rendered sixty days and more after the commencement of this suit.

We can not see how they could throw any light upon appellee's right of action on February 10, 1893. As a general rule, evidence must relate to the cause of action existing at the time of the commencement of the suit. In some instances, and for special reasons and purposes, occurrences subsequent thereto are received, but there is nothing in these exceptions to make the reception of these judgments proper. Nor are we able to say that the error was harmless.

Counsel for the appellant assert that the value of the lease for the unexpired term was not to be considered in estimating the appellee's damages. In this we think they are in error. *Carter v. Lacy*, 3 Ind. App. 54; 3 Suth. Dam., 149 (1st ed.), section 864 (2d ed.); 3 Sedg. Dam. (8th ed.), section 987; 2 Taylor Land. and Ten., page 365; 1 Woods Land. and Ten., section 317, 362; Rawle on Cov. for Title, section 169; *Clarkson v. Skidmore*, 46 N. Y. 297; *Larkin v. Misland*, 100 N. Y. 212; *Rolph v. Crouch*, 3 (L. R.) Exch. 44; *Poposkey v. Munkwitz*, 68 Wis. 322.

The judgment is reversed, with instructions to grant a new trial, and with leave to amend complaint if desired.

Filed Nov. 14, 1894.

Cooper v. The Wabash Railroad Company.

No. 1,382.

COOPER v. THE WABASH RAILROAD COMPANY.

MASTER AND SERVANT.—*Safe Place, Appliances and Transportation.*—

The master is bound to furnish his servant with a reasonably safe place in which to work, and suitable machinery and appliances, and, when he is transported from one place to another, *safe means of transportation*.

SAME.—*Ordering Servant to Perform Services Outside of His Regular Employment and More Dangerous.*—If the master or other person standing in the relation of superior or vice principal orders a servant into a position of greater danger than exists in the ordinary course of his employment, and which he would not otherwise have incurred, and he obeys, and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness.

SAME.—*Special Finding.—Recovery.*—That the special finding of facts is not sufficient to support a recovery, see opinion.

From the Warren Circuit Court.

I. E. Schoonover and *A. Schoonover*, for appellant.

W. V. Stuart, C. B. Stuart, E. P. Hammond, J. Bingham and *C. M. McCabe*, for appellee.

Lorz, C. J.—The appellant sued the appellee to recover damages on account of personal injuries alleged to have been caused by its negligence.

It appears, from the special verdict, that on the 7th day of July, 1892, the appellee controlled and operated a railroad extending from the city of Attica to the city of Covington. About three miles south of Attica there is a gravel bank near the line of said road, with a switch extending from the main line to said bank. On said day the appellee was engaged in removing gravel from said bank by causing it to be loaded upon flat cars by means of a steam shovel and persons employed to assist in such work. In making such removal the appellee would cause a train of flat cars to be backed from the main line on said switch and into said bank. For six years

prior to said day, the appellant was in the employ of the appellee as a section hand, which work was his sole duty under his employment. As such hand, he was, on said day, engaged in repairing said main line at a point about one and one-fourth miles north of the gravel bank, and was under the direction and control of one Ned Harty, the section boss or foreman.

It is further found that while so engaged at work at said point the appellee caused a train of about thirty-five flat cars to be backed southward on said main track and caused said train to stop so that the south or forward car came to a stop opposite where the appellant was engaged at work, whereupon the boss or foreman directed and commanded appellant to get upon the south or forward car, and go to said gravel bank and take the place and do the work for that day of one of the steam shovel men who was absent; that in obedience to said direction and command of said Harty, who was then and there in relation to said matter acting under orders from appellee's roadmaster, appellant got upon said car; that the top or floor of said car was covered with dirt or gravel; that appellee's clothing was wet with perspiration; that appellant took a position standing in the center of said car; that the engineer of the locomotive then backed said train with said locomotive in the direction of the gravel bank for the purpose of placing the cars upon the switch to be loaded; that said cars and locomotive were backed at the rate of about eight miles per hour, and when said train had run about one and one-fourth miles toward said gravel bank, and at a point about one-fourth of a mile north of said switch, the engineer, without giving any signal or warning, applied the air brakes on the locomotive, causing it to stop suddenly; that said train of cars had loose, slack and worn couplings and connections, and the cars were the usual and ordinary flat cars used upon

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said road in said work; that the stopping of the locomotive in the manner aforesaid caused the car upon which the appellant was standing as aforesaid to come to a stop with a violent reaction and jerk, and caused appellant to be violently thrown forward over the corner of the front end of the car on which he was riding, and severely injured; that the car upon which he was standing was an open flat car without sideboards, seats, or any sufficient means by which he could prevent or protect himself from falling off said car in the event of a sudden jar or jerk; that the appellee had knowledge of the character and condition of the car upon which the appellant was standing, and of the conditions of the couplings and connections; that appellant was not aware that he was liable to be thrown from the car, and that he exercised reasonable and ordinary care in taking a position in the center of said car; that the conductor of said train was not with it when the appellant was hurt; that the engineer did not give any signal that he intended to stop the train; that the proper way to stop said train was to set four brakes on the rear end of said train, but that only two were set when the crash came, preventing the setting of any more.

The court rendered a judgment in favor of the appellee, on the verdict, and this ruling presents the material question for our consideration.

It will be observed that the appellant was not injured while engaged in work beyond the sphere of his employment, but while being transported to the place where he was directed to work. The master is bound to furnish his servant with a reasonably safe place in which to work, and suitable machinery and appliances, and, when he is transported from one place to another, safe means of transportation. If the master or other person standing in the relation of superior or vice principal orders the servant into the position of greater danger than ex-

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ists in the ordinary course of his employment, and which he would not otherwise have incurred, and he obeys and is thereby injured, the master is liable unless the danger is so apparent that to obey would be an act of recklessness. *Miller v. Union Pacific R. W. Co.*, 17 Fed. Rep. 67.

There is no finding that in riding upon a flat car in being transported from one place to another was extra hazardous, unusual, or beyond the scope of appellant's employment. For aught that appears, he may have been required to ride upon a flat car in being carried from place to place as a section hand. Nor is there any finding that the cars or means used were unsafe or dangerous. The fact that the cars may have had loose, slack and worn couplings is not equivalent to finding that they were defective or dangerous. A degree of looseness in the couplings was essential to the operation of the train. The "worn" condition may have been slight and insignificant for aught that appears.

The conduct of the engineer in applying the airbrakes or "jammers" without giving any signals or warning does not necessarily constitute actionable negligence on the part of the company. There is nothing found from which it appears that either the law or the rules of the company required signals to be given before the brakes were applied at this point.

Nor is there any finding here that the engineer was negligent or unskillful. In the absence of all these essential facts there was no error in overruling the motion.

Judgment affirmed at the costs of appellant.

Filed Nov. 13, 1894.

The City of Valparaiso v. Ramsey.

No. 1,311.

THE CITY OF VALPARAISO v. RAMSEY.

NEGLIGENCE.—*Liability of City for Defective Culvert Overflowing Basement Room.*—*Contributory Negligence.*—If a municipality so negligently construct a sewer that it overflows a basement room of a house, the city is liable in damages, unless the party whose property is injured is himself guilty of contributory negligence in the construction of the building.

SAME.—*Reliance on Promise to Repair.*—*Contributory Negligence.*—The fact that the city promised to repair the defect, and the reliance of the property-owner on such promise, will not relieve the property-owner from the effect of contributory negligence on account of defects in the construction of the building or the arrangement of the premises, during the time of such reliance.

From the Porter Circuit Court.

N. L. Agnew and *D. E. Kelly*, for appellant.

E. D. Crumpacker, for appellee.

GAVIN, J.—The appellee recovered a judgment against appellant for damages caused by the overflowing of his basement room on account of the negligent construction of a culvert or gutter which was insufficient to carry off the water collected together at that point.

The complaint alleges the negligence of the appellant to have been the sole cause of the injury, and that appellee was wholly without fault.

The law clearly holds municipal corporations responsible for their negligence in making improvements of this character. *City of North Vernon v. Voegler*, 103 Ind. 314; *Town of Princeton v. Gieske*, 93 Ind. 102; *City of Evansville v. Decker*, 84 Ind. 325.

It is not necessary to multiply authorities in support of the proposition that he who sues another for an injury caused by that other's negligence must himself be free from contributory negligence. *Indiana Stone Co. v.*

Stewart, 7 Ind. App. 563, and cases cited; *Lyons v. Terre Haute, etc., R. R. Co.*, 101 Ind. 419.

That this general rule is applicable to the case in hand is not controverted by counsel. *Vide* 6 Am. and Eng. Encyc. of Law 24; *City of Denver v. Rhodes*, 13 Pac. Rep. (Col.) 729.

On the contrary the case was tried upon that theory. The court instructed the jury that it was essential to appellee's recovery that he should prove that he was himself free from fault contributing to the injury, and that any negligence in the construction of appellee's building which contributed to the injury would prevent a recovery. These general charges were, however, qualified by the following: "And if you further find that promises to remedy the sewer were made by authorized city officials, and that the plaintiff believed that said promises would be fulfilled, and was justified in so believing, then I charge you that during the time that plaintiff so believed in the fulfillment of said promises, and was reasonably justified in doing so as aforesaid, he is not to be charged with contributory negligence on account of any defects in the construction of the building or the arrangement of the premises."

In this qualification of its previous charges we are of opinion that the learned judge who presided at the trial was in error. We have been unable to find any legal principle upon which such an exception to the general rule can be founded.

The appellee had no right to continue one of the concurrent causes of his injury, created by his own negligence, and then recover because appellant failed to remove, according to its promise, the other cause, created by its negligence. If appellee, in reliance upon this promise, permitted his own negligence to continue, he was not enabled thereby to throw off upon appellant's

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shoulders the results of his own wrong, which was a potent factor in producing the injury.

The eminent and learned counsel who represent the appellee have not advanced any authority in support of this proposition, nor have we found any. The nearest analogy to it is that rule which holds a master responsible for his negligence where a servant continues to work with defective appliances after knowledge of such defects, relying upon the master's promise, either express or implied, to remedy the defect. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Kentucky, etc., Bridge Co. v. Eastman*, 7 Ind. App. 514, and cases cited; *Hough v. Railway Co.*, 100 U. S. 213; *Breckenridge Co. v. Hicks* (Ky.), 22 S. W. Rep. 554; *New Jersey, etc., R. Co. v. Young*, 49 Fed. Rep. 723; *Indianapolis, etc., R. W. Co. v. Ott*, 11 Ind. App. 564.

These authorities, however, do not hold that the plaintiff is, by reason of the defendant's promise, relieved from the effect of his own contributory negligence, but they only decide that such promise and reliance thereon relieves the plaintiff from the assumption of the risk of the defect, which would otherwise follow his knowledge of such defect. His recovery may still be defeated unless he is shown to be free from contributory negligence. This rule of law, therefore, falls far short of sustaining, even by analogy, the position taken by appellee upon the trial of this cause.

The judgment is reversed, with instructions to grant a new trial.

Filed Nov. 20, 1894.

Bidwell v. Rademacher.

No. 1,286.

BIDWELL v. RADEMACHER.

LIBEL.—*Publication Charging Priest with Immoral Conduct in Orphan Asylum.*—*Right of Bishop to Maintain Action.*—A bishop of the Catholic Church who, as such, is superintendent of an orphan asylum and responsible for its management and government, and for the character and conduct of employes and instructors therein, may maintain an action for libel upon a publication charging that a young girl, an inmate of the asylum, was incarcerated in a dungeon for refusing to submit to the sexual desires of a priest who officiated in the asylum as instructor, if it appear that the libelous words were published of the plaintiff.

From the Allen Circuit Court.

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

J. Morris, R. C. Bell, J. M. Barrett and S. L. Morris, for appellee.

REINHARD, J.—The appellee sued the appellant for libel, and recovered a judgment against him. The court overruled a demurrer to the complaint, and this ruling is the only error assigned.

The complaint, by way of inducement, states that appellee, as the bishop of the Roman Catholic Church for the diocese of Fort Wayne, was, and had been for a long time prior to the 12th day of January, 1894, the owner in fee-simple of a certain orphans' home or asylum, located near Fort Wayne, Indiana, which was used for the instruction, care, protection and well being, physically, morally and religiously, of the poor and destitute orphan children of the Catholic Church, and such other destitute children as might solicit a home and protection therein; that as such owner of said asylum, and as such bishop of said diocese, he had for a long time,

and still has the supervision, management and control of said asylum; that as such bishop it was his duty to select and appoint a priest to officiate in, and instruct morally and religiously the inmates of said asylum, and to see to it that he was pure and virtuous, and that he would observe as such, in connection with said asylum, all the laws of decency, decorum and virtue; that it was the duty of the appellee, as such bishop and superintendent of said asylum to appoint one of the sisters of said church, of known purity of character, exalted piety, experience and capacity, to properly watch over, instruct and protect the inmates of said asylum in the ways of honesty, morality and virtue, which appointees it was, and is the duty of the appellee, as such bishop and superintendent, to remove if in any way unfaithful or negligent in the discharge of their respective duties; that the appellee is, in fact, as such bishop and superintendent, responsible for the actions and conduct of all the subordinate employes in and about said asylum; that if any of such employes fail or neglect to discharge his or her duty, it becomes his duty to remove said delinquent.

The complaint then alleges that the appellant is the proprietor of a certain newspaper—stating its name and where published. It then avers that, with the view, and for the purpose of exposing the appellee, personally, and as such bishop and superintendent of said asylum, to the ridicule, hatred and ill-will of all good people in Fort Wayne and vicinity, and to destroy the high standing and usefulness of said asylum, and to injure all persons concerned in or connected with its management and government, the appellant did, on the day, etc., unlawfully and maliciously print, publish and circulate in said paper, of and concerning the appellee, as such bishop and superintendent of said asylum, and of and concerning said asylum, and of and concerning all who were con-

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nected with the government and management thereof, and to cause it to be believed in said city and its vicinity, that the appellee, as such bishop and superintendent, had, in violation of his duty as such, appointed an unfit, unchaste, libidinous and impious priest to look after, protect and have charge of the young and inexperienced females of said asylum, and that he appointed cruel, incompetent, immoral and unchaste females to co-operate with such unchaste and incompetent priest, in debauching such female inmates of said asylum, the following false, malicious and libelous article, in the words following, that is to say: Here the article is set out in full. Then follows the conclusion.

The alleged libelous article is as follows:

"DUNGEONS. OUR ROMAN CATHOLIC ORPHANS' ASYLUM CONTAINS THEM. STARTLING REVELATIONS OF A YOUNG LADY. INCARCERATED BY A PRIEST FOR NON COMPLIANCE.

"Much has been said concerning dungeons and those who have occupied them, because of disobeying the Jesuit or refusing him certain liberties, but the skeptical have doubted while the Romish clergy denied it. We beg permission to relate a story which occurred not long since in Fort Wayne. As nearly every one is aware, there is a Roman Catholic orphans' home on the northern boundary of our city. A young man living in that vicinity relates that as he passed daily to his employment he had observed a young lady, aged about seventeen years, at an upper window. For some time he saw nothing in that to excite his curiosity, and consequently gave it little consideration. As time passed their familiarity became closer and they spoke to each other. At no time, however, did the young man entertain the intention, or even desire, to approach closer than the walk he trod to and fro to work and home. The young lady beckoned

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him, finally, to advance to the home, but he realized he had no business on private property and refused. The beckoning became so earnest, however, that the young gentleman decided to ascertain the cause. He ventured to the building and was surprised to know that it was the desire of the young girl to quit the place. She was asked if she was not kindly treated and answered most emphatically, No! She volunteered the information that she had been shut in the dungeon for a week and was compelled to subsist on bread and water. Why?

"Now comes the answer that should arouse the furious indignation of every person who upholds decency or even modesty. This young woman, probably an orphan, for aught she knows to the contrary, bound by law to the Roman Catholic church, where she is supposed to be taught morals at least, if not religion, declared that a priest made a lewd proposition to her, and, because she spurned it, was placed in a dungeon. Behold a Roman Catholic priest, who poses in the light of the nineteenth century as a man of God, attempting to lead astray a mere child, and that in a house of worship, as they call it, because it is exempt from taxation.

"The *American Eagle* is fearless in saying it can produce the name of the young lady and the young gentleman in question. For their sake they are withheld. Now, you doubting Thomases and you who uphold this shameful proceeding by declaring there is but one church, trump up some other excuse for your indolence or idolatry. We have just begun in exposing the corruption and crime that exists in the Roman Catholic churches in Fort Wayne, and shall not rest until every convent, nunnery and orphans' home or other such house peculiar to that sect is turned inside out for public inspection."

It is earnestly contended, in argument by counsel for

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appellant, that the above publication is not libelous, and especially not as to the appellee. Any words published of and concerning the plaintiff are libelous when they are such as tend to degrade, disgrace or injure his character or reputation. *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510.

The demurrer admits every fact that is well pleaded. *Indianapolis Journal Newspaper Co. v. Pugh*, *supra*; *Ryckman v. Delavan*, 25 Wend. 186.

It is therefore admitted by the demurrer that the appellee, as bishop of the Roman Catholic church of Fort Wayne, was the owner in fee simple of the asylum; that he was its superintendent, and responsible for its proper management and government, and for the appointment of proper and suitable employes to guard, instruct and educate the children confided to its care; it admits that it was the appellee's duty to know that the employes or appointees were fit and competent persons, and that they performed their duties faithfully; that the most active vigilance was required of him in this regard to see that no unfit or improper person was employed or permitted to enter the asylum; it admits that the article was published of and concerning the appellee as the responsible head, owner and superintendent of the institution, and that the article was published of and concerning the asylum and all persons connected with its government.

It can not be successfully contended that these facts were unnecessarily averred, and therefore not well pleaded. That the publication is defamatory and libelous of some person or persons, unless justified, is certainly beyond controversy. It can not be claimed, with any degree of plausibility, that the perpetrators of such a nefarious act as that charged would not merit and probably incur the obloquy and contempt of every right thinking citizen of the community. The publication

charges that a young woman, probably an orphan, admitted into this institution to be taught morals and religion, has, according to her own statements, been systematically pursued by one who had been set over her *in loco parentis*, in an attempt to induce her to yield her body to his lustful desires, and when she spurned his advances she was locked up in a dungeon and fed upon bread and water for a week, presumably to coerce her to do that which she refused to do in response to gentler means. Whoever is implicated in such diabolical exercise of power over a helpless female (not to say a child) deserves the odium and condemnation, if not the "furious indignation," as the article insists, "of every person who upholds decency or even modesty," and that the publication was intended to have this effect, is plainly apparent upon the face of the same.

While it is doubtless true that naturally most of the odium would fall heaviest upon him who is directly connected with the affair, it does not follow that others necessarily implicated are not also injuriously affected, though it may be in a smaller degree. The charge is broad and sweeping in its application. It implicates not only the priest, who sought to seduce this girl, but it reflects directly upon the orphan asylum and its management, if not upon all the Roman Catholic churches and institutions in Fort Wayne. It plainly insinuates in the closing words, not only that corruption and crime exist, of which a specific instance has been given, but that every "convent, nunnery and orphans' home, or other such houses peculiar to that sect," is tainted with similar corruption and crime, which the writer promises to expose by turning these places inside out for public inspection.

If these charges are true, they are a sad commentary upon the management of the institution in which the

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acts were committed, as well as upon that of every "convent," "nunnery," "orphans' home" and other places of the kind connected with the Roman Catholic church of Fort Wayne, of which it is averred the appellee is the superintendent and head, and for the control and conduct of which he is responsible. Surely no parent, guardian or other person having control of children would desire to commit his sons and daughters or wards to the training of such persons or such an institution, and any one reading and believing the article, who is familiar with the appellee's connection with these places, would naturally and justly ascribe a large portion of the blame to the bishop, whose duty it is to see and know that proper management and government prevail.

In former times the rule prevailed that the construction of slanderous or libelous language would be materially affected by the position in life of the person of whom the language was spoken or written. Thus some words concerning "great men of the realm" were held actionable which would not have been so held when published concerning private persons. Language used to defame "great men" was called "*scandallum magnatum*." But no such distinction of persons is known in the United States. Townshend Sl. & Lib. (4th ed.), p. 127. There is, however, a distinction between words published of an individual as such, and words published of one in a certain capacity or official character. Thus, language may not be libellous when published of a person as a mere individual, while the same language may be actionable when spoken of such person in some special character or relation. It is the office of the *inducement* in a declaration for slander, to show that the plaintiff is the person referred to. Under our code it is not necessary in an action for libel or slander to state extrinsic facts connecting the plaintiff with the defamatory matter as the per-

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son to whom the words were applied. It is sufficient if there be an averment generally that such matter was published of and concerning the plaintiff. If the allegation be denied, it then devolves on the plaintiff to prove that the defamatory words were published or spoken of him. R. S. 1894, section 375 (R. S. 1881, section 372.)

Of course this statute does not dispense with the necessity of averring extrinsic facts to show the meaning of ambiguous language when such language is not defamatory upon its face. But when the words themselves are actionable, if they were applicable to the plaintiff, an averment that they were published of him is sufficient as an inducement. Townshend Lib. and Sl. (4th ed.), p. 540, 541.

It certainly can not be true that the publication of such matter by a newspaper is privileged. It has long been the rule that publications of this character can not be *excused* on the ground that they are matters of such public interest as to properly form the subject of comment in a newspaper. "Nor is it lawful to publish anything defamatory of a private society or religious institution, as in the case of the Scorton nunnery, where the defendant was convicted of publishing a libel with intent to defame and vilify a certain religious order or community called 'Scorton Nunnery,' and certain persons (naming them), being the Lady Abbess and nuns of the said order, and certain other persons being the chaplains thereof." Folkard's Starkie Sl. and Lib., margin p. 237.

It is true the words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. Odgers on Lib. and Sl., p. 127. But where the words are capable of having a special application to the plaintiff.

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iff, and there is an averment that they were published of him, the action will lie, although at first sight the words used may appear only to apply to a class of individuals and not to be specially defamatory of any particular member of that class. Odgers on Lib. and Sl., pages 128, 129.

Without further prolonging this opinion, it is sufficient to say that in our view the complaint states a cause of action. This is all that we are called upon to decide. The court did not err in overruling the demurrer.

Judgment affirmed.

Filed Nov. 20, 1894.

No. 1,148.

THE STATE, EX REL. SLINKARD, PROSECUTING ATTORNEY,
v. EDWARDS, ADMINISTRATOR.

DECEDENT'S ESTATE.—*Claim.—State of Indiana.—Statute of Limitations.*—The provision in section 2465, R. S. 1894, that a claim against a decedent's estate, filed after one year, shall be barred if not filed at least thirty days before final settlement of the estate, applies to a claim of the State upon a judgment on a forfeited recognizance bond; the provision of the general statute of limitations (section 305, R. S. 1894), that "limitations of actions shall not bar the State of Indiana," does not apply to claims against decedents' estates.

From the Greene Circuit Court.

W. L. Slinkard, Prosecuting Attorney, for appellant.
E. Short, for appellee.

REINHARD, J.—In view of the conclusion at which we have arrived in this case, it will not be necessary to pass upon the appellee's motion to dismiss this appeal.

The action is in the nature of a claim filed against the

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estate of the appellee's decedent on behalf of the State, by the prosecuting attorney of the 14th judicial circuit. The claim is founded upon a judgment rendered against the appellee's decedent in his lifetime as surety on the recognizance bond of one Peter Stalcup. The bond was given in the Orange Circuit Court, where a forfeiture was declared upon the principal's failure to appear, and, on the 23d day of June, 1874, judgment was entered, in the Greene Circuit Court, on the forfeited recognizance against the principal and sureties.

It appears that payments were made at different times upon the judgment, and upon the discovery of the relator that a balance still remained due upon the judgment, he immediately filed the claim against the estate of appellee's decedent.

In the court below, the appellee filed an answer in six paragraphs, the first of which was the general denial; the second a plea of the fifteen years' statute of limitations; the third set up the twenty years' statute; the fourth the six years' statute; the fifth was an answer of payment, and the sixth a special plea in bar, setting forth at length the facts upon which the appellee relied in defense of the action.

Demurrers were addressed separately to each of the affirmative answers, and overruled. Proper exceptions were reserved to these rulings, and the cause having been put at issue by the reply, was submitted to the court for trial, and, upon request, there was a special finding of facts and conclusions of law.

The specification of errors calls in question the rulings of the court upon the demurrers, and the correctness of the conclusions drawn from the findings. The alleged errors are discussed separately by counsel in their briefs, but as the merits of the controversy can be fully determined by a review of the special findings and legal

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conclusions, it will not be necessary to pass specially upon the court's rulings relating to the pleadings.

The substance of the special finding is that on the 22d day of June, 1874, the State of Indiana, on the relation of J. Wesley Tucker, prosecuting attorney of the 10th judicial circuit, then composed of the counties of Orange, Lawrence and Monroe, in said State of Indiana, recovered a judgment, in the Greene Circuit Court, upon a forfeited recognizance bond, in the sum of \$500, against Peter Stalcup as principal and Elias Edwards, Franklin Stalcup and George D. Myers as sureties; that afterwards, on the 16th day of May, 1877, there was paid to Daniel M. Bynum, sheriff of Greene county, Indiana, upon execution then in his hands upon said judgment, the sum of \$74.30, upon the principal and interest of said judgment, and that all the costs then accrued were then paid, in addition to said \$74.30, the said costs being paid by Franklin Stalcup; that afterwards said Franklin Stalcup died, and on the 1st day of February, 1884, the administrator of his estate paid upon said judgment the further sum of \$381.75 to the clerk of the Greene Circuit Court, who receipted for the same on the judgment record; that said bond, upon which the judgment was rendered, was taken in the Orange Circuit Court for the appearance of said Peter Stalcup in said court, to answer the charge of seduction, upon which he had been indicted; that said Peter Stalcup, having failed to appear to said indictment, the recognizance bond was forfeited; that on the 30th day of May, 1884, one Joseph Henley was the prosecuting attorney of said tenth judicial circuit, and as such appeared at the office of said clerk of the Greene Circuit Court and demanded of the said clerk the payment of said \$381.75 paid upon said judgment; that said clerk thereupon paid said Henley the sum of \$356.45, and took said Henley's receipt for

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the same upon the record of said judgment; that the said clerk applied the residue of said \$381.75, to wit, the sum of \$25.30 upon and in satisfaction of all costs on said judgment then remaining unpaid; that in June, 1888, said Elias Edwards died at said county of Greene, intestate, leaving as his only heirs at law a widow and his children and an estate to be administered upon; that on the 19th day of May, 1888, James S. Edwards was, by the Greene Circuit Court, duly appointed as administrator of said Elias Edwards' estate, and executed his bond with sureties, to the approval of said court, in the sum of \$10,200; that on the 23d day of May, 1888, the said James S. Edwards, having first duly qualified, entered upon the discharge of his duties as such administrator and gave notice thereof by publication, which was completed on the 15th day of June, 1888; that said administrator fully converted all the assets of said estate into money and paid all debts of said estate, except the balance of said judgment, and that after the payment of said debts and all costs of settlement he made a distribution to the heirs of the decedent, and fully and finally settled said estate; that on the 21st day of March, 1893, said administrator made out and filed in the Greene Circuit Court his final settlement report as such administrator, accounting for and paying out all the assets which had come into his hands; that at the time of filing said report the same was, by the clerk of the said court, set for hearing upon the back thereof for the first day of the April term, 1893, of said court; that on the 21st day of March, 1893, said administrator gave notice of the said final settlement report and that the same had been set for hearing on the first day of the April term, 1893, and directing therein that the creditors, heirs and legatees of said Elias Edwards, deceased, appear in the Greene Circuit Court and show

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cause, if any, why said final settlement report should not be approved; that said notice of the filing of said final settlement report and the time and place of hearing thereof was duly given by publication for three weeks successively in the Bloomfield Democrat, a weekly newspaper of general circulation, printed and published in Greene county, Indiana, and by posting up a written notice at the court house door in the town of Bloomfield, in Greene county, Indiana, which notice was fully completed on the 1st day of April, 1893; that on the 15th day of March, 1893, William L. Slinkard, prosecuting attorney in and for the fourteenth judicial circuit of said State, composed of the counties of Greene and Sullivan, made out and filed a claim against said estate upon said judgment on said recognizance bond in the sum of \$1,500, and caused the same to be docketed upon the appearance docket of said court as a claim pending against said estate; that said claim was not allowed nor paid by said administrator of said estate; that the said Slinkard, prosecuting attorney, as aforesaid, had no actual knowledge of the existence of said judgment until the day he made out and filed said claim, as aforesaid.

Upon these facts the court made the following conclusion of law:

"1. That claim of plaintiff herein is barred and that plaintiff is not entitled to recover in this action."

It will be observed from the special finding, that the judgment was recovered on the 22d day of June, 1874; that appellee was appointed administrator in May, 1888; that the claim was filed on the 15th day of March, 1893; that the final settlement report was filed on the 21st day of March, 1893, and set for hearing on the first day of the April term, 1893, of the court. It will thus be seen that a period of nearly nineteen years had elapsed from the rendition of the judgment until the commence-

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ment of this action; that the claim was not filed until nearly five years after the appointment of the administrator, and only six days before the filing of the final settlement report.

We pass over the question as to whether or not the claim was barred by any of the statutes of limitations as pleaded in the answers of the appellee. It is provided by statute that if a claim be filed after the expiration of one year from the giving of notice by the administrator of his appointment, it shall be prosecuted solely at the expense of the claimant, and if not filed at least thirty days before final settlement of the estate it shall be barred, except as otherwise provided in case of liabilities of heirs, devisees and legatees. R. S. 1894, section 2465.

It has been repeatedly held under this statute, that if the claim be not filed at least thirty days before the filing of the final report, it is barred, and the fact that it was on file before the final report was approved will not save it. *Schrichte v. Stite's Estate*, 127 Ind. 472; *Roberts v. Spencer, Exr.*, 112 Ind. 81; *Roberts v. Spencer, Exr.*, 112 Ind. 85.

If this were an ordinary claim, therefore, filed and prosecuted on behalf of a natural person, or of a corporation, there is no question that no recovery could be had upon it. Does the fact that the State is the claimant change the rule?

Section 305, R. S. 1894, enacts that "limitations of actions shall not bar the State of Indiana except as to sureties." Granting without deciding that the appellee's decedent does not occupy the position of a surety in the judgment, the question arises, does the section of the statute just quoted apply to the limitation provided in section 2465, *supra*? We are of opinion that it does not. We think it has reference to the ordinary statutes of limitation contained in the sections preceding section 305, *supra*, in the chapter of the code relating to civil

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procedure. It is our opinion that the State is as effectively barred from prosecuting a claim against a decedent's estate which was not filed at least thirty days before the filing of the final-settlement report as any other claimant would be barred. If the State may never be barred from filing and prosecuting a claim against estates of deceased persons, then it may prosecute such claims even after the final report is made and approved and the administrator or executor is discharged, and it is not and will not be contended that this may be done.

Section 305, *supra*, is applicable to all claimants. Of course if the claim is otherwise barred by the limitation prescribed in the civil code, it will be barred without reference to the provision contained in section 2465, *supra*, except where the State is the claimant and the decedent did not occupy the position of a surety.

The learned prosecuting attorney contends that an exception should be made for the reason that in the present case the claim was not discovered until the very day of its filing. If this were a sufficient excuse, we can not concede its existence in point of fact. Presumably there were other officers of the State whose duty it was to look after the collection of the judgment before the relator's accession into office. If these, or any of them, had exercised the same diligence as the relator, we see no reason why the claim might not have been filed and collected long before the final report was filed. Their laches may constitute sufficient ground for rendering them liable on their official bonds, perhaps, but it furnishes no exception to the statutory rule that such claims must be filed at least thirty days prior to the filing of the final report.

We think the court reached the proper conclusion from the facts found, and that there is no reversible error in the record.

Judgment affirmed.

Filed Nov. 2, 1894.

Moffitt v. The Phenix Insurance Company.

No. 1,351.

MOFFITT v. PHENIX INSURANCE COMPANY.

INSURANCE.—*Transfer and Assignment.—Waiver of Conditions as to Notice and Indorsement.*—Conditions in a fire insurance policy providing that the policy shall be void if written notice of a transfer of the property be not given, or if the policy be assigned before loss without the assent of the insurer indorsed thereon, may be waived.

SAME.—*Assenting to Assignment.—What is Sufficient.*—In assigning a policy, any method of assent by which the insurer leads the assured to consider that the assignment is sufficient, is all that is required.

SAME.—*What Amounts to Waiver of Conditions.*—Where at the time of the transfer of insured property the insurer is orally notified of the transfer and assignment, and, having the policy in its possession, with nearly five years to run, consents thereto, and does not avail itself of its right to cancel the policy, but fails to indorse its consent upon the policy, its conduct is such as to mislead the assured and his assignee, and the conditions requiring written notice of transfer, and requiring indorsement upon the policy, will be deemed waived.

SAME.—*Consent to Transfer.—Effect as to Assignment.*—The insured's consent to a transfer of the property will not be effective as to an assignment of the insurance to the grantee unless such consent is given with knowledge that it is the purpose and agreement of the assured and his grantee to transfer the insurance as well as the property.

SAME.—*Assignment After Loss.*—A policy of insurance, after the destruction of the property, becomes a mere chose in action, and may be assigned as such.

SAME.—*Conditions Precedent.—Pleading.*—A general averment that the insured and his grantee and assignee have performed all the conditions of the policy on their part to be performed is a sufficient pleading of the conditions precedent.

From the Marion Circuit Court.

W. V. Rooker, for appellant.

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellee.

LOTZ, C. J.—The appellant sued the appellee on a fire insurance policy. The court below sustained a demurrer

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for want of facts, to each paragraph of her complaint. These rulings are the errors assigned in this court.

The facts as alleged in the first paragraph are, in substance, that on the 9th day of January, 1893, the defendant (appellee), for value, executed its policy of insurance whereby it agreed to indemnify one F. B. Rooker against loss or damages by fire to an amount not to exceed the actual cash value of the property described in the policy, and in no event to exceed \$600 on said Rooker's one and one-half story frame dwelling occupied by the assured, and \$200 on his frame barn, situate on certain described real estate in Hamilton county, Indiana; that on the first day of March, 1893, Rooker sold to the plaintiff the premises and property described in said policy; that at the time of said sale the defendant was notified that plaintiff had purchased the property and gave its consent thereto; that at the time such notice was given, the defendant had the policy in its possession; that on the 29th day of March, 1893, the dwelling house, while still occupied by Rooker, was totally destroyed by fire originating from causes unknown; that the actual cash value of said house immediately preceding its destruction was \$1,200; that within six days after such loss said defendant was orally notified thereof by plaintiff; that upon such notice being given, defendant immediately repudiated its previous consent given to said transfer, and gave as its reason therefor that said consent was not expressed in writing, and declined to treat further with plaintiff concerning said loss; that the plaintiff has performed and offered to perform all and singular the duties and obligations imposed upon said Rooker and upon the plaintiff under the terms and conditions of said policy; that the defendant wrongfully declines and has refused to adjust or pay such loss.

The second paragraph differs from the first, in that it

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is averred that on the 18th day of April, 1893, the defendant confirmed its consent to the transfer of said property as previously given in parol by a memorandum in writing indorsed upon the policy. This written memorandum is in these words: "The Phenix Insurance Company hereby consents that the interest of F. B. Rooker in the within policy be assigned to Jane Moffitt, subject, nevertheless, to all the conditions contained therein. April 18, 1893. Signed in behalf of the company: W. A. Wainwright, agent." A copy of the policy is made an exhibit to each paragraph.

The policy, among other things, contains the following provisions:

"If the property be sold or transferred * * * or any change takes place in the title or possession * * *, or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, this policy shall * * * be void.

"* * * When the property insured shall be sold or encumbered, or otherwise disposed of, written notice shall be given to the company of such sale or encumbrance or disposal, and its assent thereto indorsed hereon, otherwise this insurance on said property shall immediately terminate. * * *

"It is understood and agreed that agents of this company have no authority in any manner or by act or omission whatsoever, either before or after making this contract, to waive, alter, modify, strike from this policy or otherwise change any of its conditions or restrictions except by distinct specific agreement clearly expressed and indorsed hereupon, and signed by the agent making it. Nor shall silence upon receipt of notice of breach of any condition or restriction herein, or failure to declare this policy forfeited thereby, or the issuance of any renewal or new policy, or the acceptance of any premium

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or other money, or any other act or omission whatsoever by any agent of this company, whether with or without knowledge of such breach, or whether before or after making this contract, work any waiver of such conditions or restrictions, or effect any estoppel against this company or deprive it of any forfeiture or defense, either in law or in equity, to an action upon this policy."

It also appears from the policy, that it was to continue for the period of five years from the 9th day of January, 1893, and that the premium paid was the sum of \$12.

It is also provided that "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

A contract of fire insurance is a contract of indemnity. It is an engagement to make good loss that may be sustained. Unless the assured has a pecuniary interest in the property or thing, there is nothing upon which the principles of indemnity can operate. The subject of the indemnity is not the particular article or building named in the contract (although generally so called), but the interest the assured has in the property or thing. It is therefore necessary that the party insured should have an interest in the property at the time the policy is written and at the time of its loss. As it is not possible to insure a thing against destruction, insurance means to indemnify the owner of the thing from loss or damage. A contract of insurance is personal as to the assured. It is not such an incident to property as will pass to an alienee or vendee. The character of the assured is an important element in the contract, and one person can

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not be substituted for another without the consent of the insurer. These various propositions are so well established as to need no citation of authorities to support them. The appellant concedes their correctness, but contends that when the appellee received notice of the transfer of the property, and consented thereto, retaining the unearned premium, it was in legal effect an assignment of the policy or the creation of a new contract between her and the appellee by parol; that the conditions in the policy, to the effect that written notice of the sale or transfer of the property must be given, or if the policy be assigned before loss, without the consent of the company indorsed thereon, shall terminate, or render void the policy, are conditions that may be waived.

It is well settled that a contract of insurance may be made in parol. *Commercial, etc., Assurance Co. v. State, ex rel.*, 113 Ind. 331 (338).

If the contract may itself be created in parol we know of no valid reason why it may not be assigned in parol. It is true that the parties may stipulate how the assignment shall be made, and ordinarily the mode prescribed should be followed, but such conditions are conditions for the benefit of the insurer, and may by him be waived. The assignment of the policy to the purchaser of the property is the creation of a new contract.

In *Continental Ins. Co. v. Munns*, 120 Ind. 30 (34), the court by MITCHELL, J., said: "An assignment of an insurance policy without a transfer of the property insured, would be an idle ceremony so far as transferring * any beneficial interest in the contract. On the other hand, the transfer of the property insured suspends the operation of the policy, which becomes inoperative for want of a subject-matter to act upon, until by the assignment and assent of the company a new contract of insurance, embodying the same terms and conditions as

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the old, arises between the latter and the purchaser. The contract of insurance thus consummated arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old."

This court, in *New v. German Ins. Co., etc.*, 5 Ind. App. 83, in speaking of the consent of the insurer to the assignment of the policy, said: "Such consent is equivalent to the creation of a new contract between the assignee and the insurer, according to the terms of the policy assigned. It is not strictly an assignment but the making of a new contract."

It follows from this that when the appellant notified the appellee of the transfer of the property a new contract of insurance was in contemplation, and the terms and conditions of the old contract was to be the basis of the new. Had they pursued the course provided in the policy, it would have been necessary to give notice in writing to the appellee of the contemplated transfer, and for the appellee to have indorsed its consent to the transfer upon the policy. The assignment or new contract would then have been completed. Surely the company could waive the notice in writing. It is averred that it gave its consent to the transfer, and that it then had the policy in its possession. The indorsement of the consent on the policy was an act to be done by it and not by the appellant. But a still stronger consideration for holding that the appellee waived these requirements is, that at the time of the transfer but a small amount of the premium had been earned. The policy had nearly five years yet to run. Had the appellee refused to give its consent to the transfer, then the assured named in the policy would have had the right to cancel it at short rates and the unearned premium returned. The company also had the right to cancel the

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policy at any time at its option upon the same terms. It did not avail itself of this, nor did it give the assured an opportunity to do so. By its acts it misled the assured and his assignee to their injury and to its own gain. Had it refused its assent, the appellant would then have had an opportunity to obtain insurance elsewhere.

In assigning a policy, any method of assent by which the insurer leads the assured to consider sufficient is all that is required. *Shearman v. Niagara, etc., Ins. Co.*, 2 Sweeny (N. Y.) 470; *Fogg v. Middlesex, etc., Ins. Co.*, 10 Cush. 337.

It has also been held that the insurer may indorse his assent after the sale, though a clause provides that in the case of a transfer of the property without the company's consent the policy should be void. *Gilliat v. Pawtucket, etc., Ins. Co.*, 8 R. I. 282.

The case of *Phenix Ins. Co. v. Hart*, (Ill.) 36 N. E. Rep. 990, is a well considered case bearing upon some of the questions here involved. There a policy upon a farm building declared that any change in the title or interest of the assured in the property without the consent of the company indorsed thereon would render the policy void. The insured mortgaged a part of the farm, but not the part on which the house stood, and asked the company's local agent whether it was necessary to have the company's consent indorsed on the policy. It was held that the agent's reply that it was not necessary was a waiver by the company of the condition. Citing in support thereof, *May on Insurance*, section 143; *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Williamsburg, etc., Ins. Co. v. Cary*, 83 Ill. 453.

It is also held in the same case that a stipulation in the policy that the conditions of the policy can be waived only by the general agent in writing does not render an

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oral waiver by a local agent inoperative, since such stipulation may itself be waived.

As opposed to the rules announced in the Illinois cases above cited the appellee cites and relies upon *Langdon v. Minn. etc., Ins. Assn.*, 22 Minn. 193. We think, however, that the rules announced by the Illinois court the more equitable. The appellee also cites a number of cases which hold that mere notice or knowledge on the part of the company of a change in interest or the breach of the conditions does not operate as a waiver of the conditions. *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75; *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239; *Smith v. Phenix Ins. Co.*, 23 Pac. Rep. 383.

The averments in the case at bar go much farther than notice or knowledge of the transfer. Consent to the transfer on the part of the appellee is averred.

The averments with reference to notice and consent to the transfer are indefinite. The remedy under such circumstances is by motion to make more specific.

The averments sufficiently show that Rooker had an interest in the property at the time the policy was executed, and that the appellant had an interest at the time of its destruction within the rules laid down in *Phœnix Ins. Co. v. Benton*, 87 Ind. 132. The general averments that the appellant and Rooker had performed all the conditions on their part is a sufficient pleading of the conditions precedent. *Louisville, etc., v. Durland*, 123 Ind. 544; *Commercial, etc., Assurance Co. v. State, ex rel.*, *supra*.

Other objections made to the first and second paragraphs are the want of an averment that the transfer or assignment of the policy formed any part of the transfer of the title, or that appellee had any notice or knowledge of any agreement between Rooker and Moffitt to assign or transfer the insurance. A mere naked consent to the

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transfer of the property could not operate either as a waiver of the conditions of the policy or as an estoppel. To be effective as an assignment or a new contract of insurance between the appellant and appellee, the consent must have been given with the knowledge that it was the purpose and agreement of Rooker and Moffit to transfer the insurance as well as the property. For want of such averments, these paragraphs must be held insufficient.

The third paragraph alleges the issuing of the policy to Rooker, the destruction of the house and the subsequent assignment of the policy to the appellant. After the destruction of the house, the policy became a mere chose in action and might be assigned like any other chose in action. This paragraph was sufficient.

Judgment reversed at costs of appellee, with instructions to overrule the demurrer to the third paragraph of complaint, and for further proceedings in accordance with this opinion.

Filed Nov. 15, 1894.

No. 938.

KEPLER v. JESSUP.

PLEADING.—*Argumentative Denial.*—*Demurrer.*—Available error can not be predicated upon the overruling of a demurrer to a special paragraph of reply which is good as an argumentative denial of the facts averred in the answer to which it is addressed.

PAYMENT.—*Of Sum Less than Debt.*—*Effect of.*—The payment of a sum less than the amount actually due will not operate as a satisfaction of the entire debt, even though a receipt in full be given, unless there is a positive agreement to receive the sum paid in full discharge.

SAME.—*Application of Credits.*—*Judgment.*—Where an action involves

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several claims it is not material how credits due the defendant are applied by the jury where there will be in any event a balance which will form the basis of a simple money judgment.

DEED.—Mortgage.—Lease.—Landlord and Tenant.—Set-Off.—Estoppel.—A party who has the legal title to land, and treats the property as his own by leasing it to another, can not as against the latter, while seeking to recover rent from him as tenant, assert that his deed is a mortgage, and obtain a set-off of the alleged mortgage debt against a demand preferred by his lessee.

SAME.—Instruction Assuming Character of Instrument.—Where in a trial by jury it is a disputed question as to whether an instrument is a deed or mortgage, it is proper to refuse to give an instruction which assumes that the transaction amounts to a mortgage.

INSTRUCTION TO JURY.—Must be Applicable.—An instruction which is not applicable to the case made by the evidence will be properly refused.

SAME.—Burden of Proof.—An instruction as to the burden of proof, even if technically inaccurate, will not avail to reverse a judgment where, when considered in connection with other instructions given, the case is properly put to the jury.

ATTORNEY AND CLIENT.—Care and Skill.—Soundness of Opinions.—Instruction.—An instruction that an attorney is responsible to his client only for the want of ordinary care and skill, and reasonable diligence, and that the skill required has reference to the character of the business undertaken; that if he is employed to bring suit, and undertakes to do so but negligently fails, he is liable for resulting loss; that there is no implied agreement that the attorney will guarantee the success of his proceedings or the soundness of his opinions; that he only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence and skill would commit, is sound.

COSTS.—Apportionment.—Where witnesses testify upon issues as to which the defendant prevails, and also testify to other matters involved in the action, the costs should abide the result of the trial.

From the Henry Circuit Court.

M. E. Forkner, L. E. Kepler and T. J. Study, for appellant.

H. C. Fox and J. F. Robbins, for appellee.

REINHARD, J.—Action by the appellee against the appellant on an account for attorney's fees, office rent and the use of a law library, amounting, in the aggregate, as charged in the bill of particulars, to \$1,500.

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Answer in twelve paragraphs, consisting of general denial, payment, set-offs and counterclaim. Reply in three paragraphs. Trial by jury, and verdict in favor of appellee for \$565. Appellee remitted \$41.90, and the court rendered judgment for \$523.10.

The first specification of error relied upon is the overruling of the appellant's demurrer to the third paragraph of the appellee's reply to the sixth and seventh paragraphs of the answer.

To determine correctly the sufficiency of this paragraph of the reply, it is necessary to look to the two paragraphs of answer to which it is addressed. In the sixth paragraph of the answer, which is a set-off amounting to \$336.61, it is averred in substance that on the 4th day of April, 1888, the appellee owed the appellant \$100, which is due and unpaid, and that on or about that day the appellee contracted for and purchased forty-five acres of land in Adams county, Ohio, and caused the same to be conveyed to the appellant; that at the same time, and as a part of the same transaction, the appellee and the appellant entered into a written agreement, filed herewith as exhibit "E," for the repayment of said \$100, which appellant then owed appellee, and for the further sum of \$150 which appellant, on said day, loaned the appellee, and which is also due and unpaid, making in all the sum of \$250; that the said \$250 mentioned in the written agreement, and the rent therein mentioned, which was intended as the interest on said money at the rate of eight per cent. per annum, remains due and unpaid; that the real estate was conveyed to appellant as aforesaid, and the said written agreement was executed to secure the payment of said money; that by the terms of said written agreement the appellee was also to pay the taxes on said real estate, but that he has wholly failed to do so, but has allowed the same to become delinquent, and that appellant was

required to pay them, all of which sums remain due and unpaid, and which appellant offers and pleads as a set-off to an equal sum of said alleged indebtedness sued on by appellee.

The seventh paragraph of the answer is also a set-off for \$77.61, and has reference to the same transaction, setting forth the same written agreement and making it an exhibit. This paragraph treats the land transaction as an absolute sale, and claims there is due from appellee to appellant the rent which has accrued under the agreement, and the taxes which the appellee was to pay, but which, owing to appellee's failure to do so, were paid by the appellant.

The substance of the written agreement, which is pleaded as the foundation of both the sixth and seventh paragraphs of the answer, is that the appellant has leased to the appellee certain real estate in Adams county, Ohio, which is fully described, for the period of three years, for the following rents, viz.: the taxes on said land and the sum of \$20 per annum in cash; also all repairs on the property, the rents to be paid quarterly in advance. The taxes were to be paid by the appellee in addition to said \$20 a year, as rent, and before they became delinquent. It was further agreed that appellant should convey and warrant (except taxes) all his right, title and interest in said land to the order of appellee for \$250, at any time within three years from the date of the instrument: *Provided*, that appellee kept the taxes paid up before they became delinquent, paid the cash rent as specified, and kept the property and improvements in as good condition of repair as they were then in; that if appellee failed to pay the taxes, or rent, or the \$250, when any part thereof became due, he should forfeit all right to the possession or ownership of the property, and

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appellant was to have full power to take possession for his own use forever.

The third paragraph of the reply, to which the demurrer was addressed, undertakes to explain, and give in detail the consideration for the \$100 which the answer avers to be a portion of the consideration for the Ohio land transaction, showing it to be another real estate transaction concerning a lot in Cambridge City, Indiana, which the appellant had purchased for appellee, and the legal title to which was in the appellant, and which lot was taken in exchange by the owner of the Ohio land, in part payment for the same. It is then averred that appellant was to hold the Ohio land until April 4, 1891, when, at the election of appellee, he was to convey said land to appellee for \$250, and an additional sum equalling the taxes on said property and interest on said \$250 at the rate of eight per cent., and that the lease and instrument of writing set out in the sixth and seventh paragraphs of answer was made to show said facts, and to secure the appellant as to said matters, provided the appellee elected to take said land; that in truth and in fact the appellee was never in possession of said Ohio land, but the same was always in the possession of appellant; that appellee never elected to take said land under his option in said agreement, and the time for said election having long since passed, the appellant has become the absolute owner of the same, and no part of the amounts named in said answers are therefore owing from appellee to appellant.

The construction of the contract relied upon by both parties involves many intricate and far-reaching questions concerning the effect of the conveyance to the appellant, the nature of his title, and the interest of the appellee in the same. The appellant holds the legal title to the property. The appellant insists that his deed

is only a mortgage to secure certain debts owing to him by the appellee, and which the appellant seeks to set off against a corresponding amount that might be found due the appellee. The appellee contends that the contract amounts to a conditional sale of the land by the appellant to the appellee; that the conveyance to appellant was not as a security, but that it was made for the consideration of his indebtedness to the appellant, upon the condition that appellee might purchase it from appellant within three years, at a certain price, failing in which all of appellee's interest therein was forfeited.

We need not stop to determine who is in the right in this contention. The reply is as broad as the answer. If the written contract could not be explained by parol, and the attempt to do so would make the reply bad, the sixth paragraph of the answer was equally as faulty for pleading extraneous matter as was the reply. The latter is at least good as an argumentative denial of the facts averred in both paragraphs of the answer, and, this being so, no available error was committed in overruling the demurrer to it. *Loeb v. Weis*, 64 Ind. 285; *Leary v. Moran*, 106 Ind. 560.

The overruling of appellant's motion for a new trial is assigned as error. Under this head appellant's counsel discuss together the following causes assigned:—Error in the assessment of recovery, in that it is too large; that the verdict is not sustained by sufficient evidence; that the verdict is contrary to law.

No particular errors of law have been pointed out, and we need, therefore, only determine the two remaining questions. To establish the first proposition above stated, viz.: that the amount of the recovery was too large, appellant's counsel in their argument recur to the interrogatories answered by the jury, and contend that

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these override the general verdict to the extent of the excess insisted upon. As before stated, before judgment was rendered the appellee entered a remittitur for \$41.90, leaving the amount of the verdict, \$523.10, for which judgment was rendered. The effect of the remittitur was, it will be admitted, as if the verdict returned had been for \$523.10 instead of \$565.

By the first interrogatory and answer thereto the jury fixed the amount of appellant's indebtedness to the appellee, "not deducting any payments or set-offs," to be \$667. The second interrogatory and answer thereto are as follows: "What amount has the defendant paid the plaintiff on his cause of action, including credits on Katie Jessup's notes and land controversy? Ans. Nothing."

It is insisted by appellant's counsel that there was uncontradicted evidence from which the jury were compelled to find, in answer to the second interrogatory, that payments and credits amounting to at least \$110 were due the appellant and for which no allowance was made him. It must be admitted, we think, that under the evidence the appellant was entitled to some credits for payments and the Ohio land transaction. But what the correct amount of such credits is, outside of that due upon the Ohio land matter, we think was not an undisputed fact, and we are not able to agree with counsel that it was as much as \$110. It may therefore be conceded that the *prima facie* answer to the second interrogatory is wrong. It only remains to be seen whether this apparent error is a real one, and whether it must necessarily lead to a reversal of the judgment.

That the jury did not intend to find, by the answer to the second interrogatory, that no credits whatever were due the appellant, is apparent from the fact that they did allow the appellant a credit. The general verdict (in-

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cluding the remittitur) showed a credit of \$143.90, for, if we take this amount and add it to the amount of the judgment (\$523.10), we obtain the amount which the jury say was the indebtedness of the appellant to the appellee, viz., \$667, not deducting any payments or set-offs. It follows, therefore, that appellant received a credit of \$143.90 for payments and set-offs. The answers to the fourth and seventh interrogatories show that \$62 of this credit was on the Charles Rauth note, \$10 thereof on account of money collected on the Erwin judgment.

These answers convince us that all the credits allowed on set-offs were the \$72 on the items above mentioned, which goes to show that, including the remittitur, the appellant has received credits for payments amounting to \$71.90, and we can not say that the uncontradicted evidence proves that he was entitled to more.

Nor can we agree with counsel that no explanation was offered to the "receipt in full" given in evidence by appellant, under date of October 14, 1886.

This receipt, on its face, purports to be only for fees, and does not, therefore, account for any rents or the use of the library. It is true the appellant testified that he had no recollection what the receipt was given for, but the entire business transactions between the parties seem to have been gone over by the jury, the parties having submitted evidence covering the whole of their dealings, and if the jury believed, from the facts before them, that the receipt was given through a mistake, they had the right to disregard it, as it was only *prima facie* evidence of its correctness, and the payment of a sum less than the amount actually due, will not operate as a satisfaction of the entire debt, even though a receipt in full be given, unless there is a positive agreement to receive the amount paid in full discharge of the debt. *Markel's Admr. v. Spittler's Admr.*, 28 Ind. 488; *Ogborn v. Hoff-*

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man, 52 Ind. 439; *Board, etc., v. State, ex rel.*, 109 Ind. 596.

It was not an undisputed fact in the case, that there was a controversy between the parties at the time the receipt was given, and a settlement in which the amount named in the receipt was taken in full satisfaction of all the appellant owed the appellee.

In the answer to the third interrogatory, the jury found there was nothing due the appellant on the other land transaction. We think the evidence fairly supports the theory that the transaction was a conditional sale, in which the appellee had the option of taking the land at the price named, and if he declined to do so, he can not be held liable for any portion of the consideration therefor. Moreover, there was no tender of a deed from the appellant to the appellee, and if he still retains the legal title to the land he is in no position to recover for the purchase-money, or its equivalent. Of course, if the appellant leased the land to the appellee, outright, in consideration of the taxes and \$20 annual rental, the appellant would be entitled to a credit for such rent and taxes. But the nature of the transaction respecting the land was a matter of serious controversy between these parties. The appellee testified that he had no money interest in the land, but admitted that he was to have the option of purchasing it within three years, or of selling it to a third party and receiving out of the proceeds all above the \$250, interest and taxes, the surplus going to the appellee as compensation for legal services in the litigation concerning the Cambridge City property. He also testified that he found a purchaser for the land within the three years, who had agreed to pay \$400 for the same, and that he wrote to the appellant for a deed with the name of the grantee in blank, but that the appellant refused to send the same to him, but did send

such a deed to the county seat of the county in Ohio, where the land was situated, with directions that the deed be delivered to appellee whenever he paid the \$250, interest and taxes, amounting to about \$310.

Appellee further testified that while these negotiations were going on and before he was informed of the situation as to the deed, the party who had agreed to purchase the land refused to take it, and the trade was not consummated. He further stated, in his testimony, that he personally never occupied the land, but admitted he had placed a man in possession thereof, who made some repairs and improvements on the place, in consideration of the use and occupation, but that appellee never received any benefit thereof.

We think that both the written agreement and the appellee's testimony tend to show a conditional sale of the land upon the terms that appellee might become the purchaser thereof at the price of \$250, together with the interest or rental at \$20 per annum and the taxes.

Upon this hypothesis whenever the appellee concluded to pay these amounts, the appellant was under obligation to make him a deed, and if appellee sold the land to a third person he was to receive all that was realized over and above the amounts heretofore specified. If this was not done within three years, the appellant was discharged from further obligation of making a conveyance of this land to the appellee. Appellant having the legal title to the land and treating the same as his property, by leasing it to appellee, and seeking in this very action to recover for the rent of the same, can not now be heard to say, as it appears to us, that the transaction constituted a mortgage and that he should have the benefit of the purchase-money or what he denotes as the mortgage debt, by way of a set-off.

We think the most he can be held to be entitled to re-

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cover, is the rent of the property, amounting to \$77.61, as alleged in the 7th paragraph of the answer, and as proved by the evidence. We think that this amount should have been allowed the appellant as a further credit, but as to any other credits, and as to the appellee's claim declared upon, the evidence is conflicting, and we can not disturb that portion of the judgment.

As further causes for a new trial, the appellant has assigned the refusal of the court to give certain instructions asked by him, and the giving of others upon the court's own motion.

The first instruction requested and refused was to the effect that the deed and contract, as to the Ohio land, when taken together, constitute a mortgage, and that the claim of appellant for the mortgage debt, that is to say, the \$250 forming the consideration for the purchase of such land, should be allowed as a set-off to the appellant. This instruction was correctly refused. We think the evidence strongly tends to show the transaction to have been a conditional sale. The appellant still retains the title and possession of the property as the owner thereof. No proper tender of a deed was ever made to the appellee, and the appellant does not now offer to convey the land to the appellee if judgment for the purchase-money be awarded him. But the instruction assumes that the transaction amounted to a mortgage.

The question was in dispute, and the court could at most have been required to submit it to the jury upon all the evidence in the case. It seems to us that it comes with ill grace from the appellant to claim the land as the absolute owner, attempting to collect rent therefor as landlord, and at the same time insist that he was only a mortgagee, and should have credit for the mortgage debt. He can not have both.

There was no available error in refusing the second

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instruction asked. In so far as it states the law correctly, it is fully covered by the 9th instruction given. It could have made no difference upon which claim of the appellee the respective credits due the appellant were applied, as in the end it must, in any event, result in a balance which will form the basis of a simple money judgment.

The rule as to preferred credits could have no application, inasmuch as both the preferred and unpreferred credits must go to the reduction of the appellee's demands.

In the fifth instruction submitted by the appellant and refused, the court was asked to charge the jury, in effect, that if the appellee entered into an agreement with the appellant to divide with him the attorney's fees recovered upon any note or mortgage providing for attorney's fees, such contract was void for champerty, and no part of it could be recovered by appellee from the appellant, although the latter had collected the whole.

It is doubtful, in our opinion, whether the rules as to champertous contracts apply to a transaction of this character to the extent of depriving the appellee from collecting any portion of the fees which have been received by the appellant in the collection of the judgments in which they must have been included if they had any existence.

We have not been able, however, to find any evidence in the record, which tends to prove that any of the fees charged for in the complaint were such as had been recovered in a suit or suits, and of which the appellant was to retain a portion and pay the appellee the remainder. Certainly the testimony to which the appellant's counsel have referred us in their briefs is not of that character.

John Galloway, a witness called by the appellant, tes-

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tified to a conversation in which appellee told him that Mr. Kepler gave him a good deal of business, and that it was profitable, and that he divided the fees with him.

Whether any such divided fees constituted any of the items in suit, does not appear, nor does it follow that because the appellee said he divided fees with appellant he gave him any portion of the fees collected from the adverse parties in suits upon notes or mortgages. Appellee had a right to "divide fees" with his client, by transacting his business for a smaller compensation than that which is customary, and this is the only reasonable construction that can be placed upon the appellee's alleged admission. We are strengthened in this view by the fact that upon cross-examination the witness was asked expressly if the conversation had reference to dividing fees in suits on notes containing stipulations for the payment of attorney's fees, and the witness declined to give any explanation further than to repeat that appellee said "he divided his fees with Mr. Kepler."

The other witness who, it is claimed, testified to a division of fees was the appellant himself. He stated that when he first began business with Mr. Jessup he (witness) told appellee that he desired to give all his business to one attorney, and that appellant wanted to have the privilege of looking at appellee's books whenever he wanted to look up the law, and also to help appellee with the cases, in consideration of which he made the appellee the proposition that "his fees should be one-half of the fees that are generally allowed," to which Mr. Jessup agreed. Later on the appellant testified further that in consideration of this reduction in the fees, appellant was to give appellee all of the former's business in court, and not employ other attorneys. No inference could properly have been drawn by the jury from any of the testimony mentioned that the arrangement for a di-

vision of fees had reference to cases in which judgments for attorney's fees were recovered, or fees collected from the maker of a note or other contract, and in which the appellant and appellee were to share the fees, or that in pursuance of such arrangement any division had taken place, or that it was attempted to enforce any such division in the present action.

Instruction number five, given by the court, is complained of. In it the court charged the jury that the burden was on the defendant to prove his answers by a fair preponderance of the evidence. As the general denial was among the answers, it is insisted that this instruction made it incumbent upon the appellant also to prove such general denial by a preponderance of the evidence. There is no merit in this contention. In the second instruction the court informed the jury that to entitle the plaintiff to recover he must prove some one or more of the several items of his complaint by a fair preponderance of the evidence. The instructions when considered as a whole could not have misled the jury on this point. *Conway v. Vizzard*, 122 Ind. 266; *Deig, Exr., v. Morehead*, 110 Ind. 451.

Appellant also insists that instruction number eight was wrong. The substance of this charge was that an attorney acting under the employment of his client is responsible to him only for the want of ordinary care and skill, and reasonable diligence, and that the skill required has reference to the character of the business he has undertaken to do. If he is employed to bring suit, and undertakes to do so but negligently fails to do so, and by reason of such negligence a loss results to the client, he will be responsible for such loss. There is no implied agreement in the relation of attorney and client, or in the employment of the attorney by the client, that the attorney will guarantee the success of his

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proceedings in a suit or the soundness of his opinions. He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit.

We can discover nothing unsound in this instruction. It is certainly not the law that an attorney in all cases warrants the soundness of his opinion.

While it may be true, abstractly, that there never can be but one correct determination of any controverted legal question, it is also true that frequently the most skilled and learned attorneys, and even judges of courts, honestly differ in their views of interpretation of the laws. If lawyers were required to warrant the absolute correctness of their opinions in all cases, very few of them, if any, could stand the test. Such a qualification is certainly not required in any other profession, trade or occupation, and we can not conceive upon what principle a rule of such a character should be applied to practicing attorneys. The law does exact of an attorney that ordinary skill and learning which members of his profession generally possess. It also requires him to exercise the utmost good faith with his client and holds him responsible for any negligent omission in the performance of his duty. *Hillegass, Admr., v. Bender*, 78 Ind. 225; *Reilly v. Cavanaugh*, 29 Ind. 435; *Moorman v. Wood*, 117 Ind. 144; *Citizens, etc., Association v. Friedley*, 123 Ind. 143.

The instruction in nowise conflicts with any of the well settled rules which appellant's counsel state in their brief. If the appellant desired a more explicit instruction upon the subject and have it applied to the phase of the evidence most favorable to his side he should have prepared such an instruction and asked the court to give it.

The last assignment of errors relates to the overruling

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of the appellant's motion to apportion the costs of certain witnesses. These witnesses, so far as we have been able to ascertain from that portion of the record to which appellant's counsel have referred us, gave testimony upon an issue or issues upon which the appellant was successful. But they also testified to other matters, such as the reputation of one of the parties, which testimony was not necessarily confined to the issues in which the appellant prevailed. Under these circumstances it is difficult to conceive how the circuit court or this court could intelligently make an apportionment of the costs of these witnesses or why such costs should not abide the result of the trial.

We find no available error in the record, except that upon the theory of appellant's ownership of the Ohio land and the leasing of the same to the appellee, the appellant is entitled to an additional credit of \$77.61 for rent and taxes during the three years of the appellee's occupancy of the same. If the appellee will, therefore, remit the amount of \$77.61 within thirty days, the judgment will be affirmed at appellee's cost, otherwise the judgment is reversed, with directions to sustain the motion for a new trial.

DAVIS, C. J., and GAVIN, J., dissent, believing the case should be reversed.

Filed May 18, 1894; petition for a rehearing overruled Nov. 13, 1894.

END OF MAY TERM.

CASES
ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1894, IN THE SEVENTY-
NINTH YEAR OF THE STATE.

No. 1,541.

BOOS ET AL. v. THE STATE, EX REL. SLINEY.

INTOXICATING LIQUORS.—*Sale to Minor.*—*Drowning While Intoxicated.*
—*Action Upon Bond for Damages.*—*Proximate Cause.*—*Sale by Em-
ploye, Liability for.*—Where a licensed retailer, who, either himself
or through an employe acting within the scope of his employment,
unlawfully sells or furnishes intoxicating liquors to a minor, where-
by the latter becomes intoxicated, and while on his way home in
that condition falls into a river and is drowned, an action for dam-
ages therefor may be maintained upon his bond.

SAME.—*Criminal Character of Act Does Not Believe from Liability.*—In
such case, the fact that the act of the employe in making the sale or
furnishing the liquor to the minor was criminal will not relieve his
principal from liability.

SPECIAL VERDICT.—*Additional Findings, Motion for.*—*Practice, Appel-
late Court.*—No question is presented on appeal upon an oral motion
in the trial court to require a jury, which has brought in a special
verdict, to return to the jury room and find upon other facts, unless
the motion is brought into the record.

SAME.—*Venire de Novo.*—A *venire de novo* will only be awarded where
the special verdict is ambiguous, indefinite or wanting in form.

Boos et al. v. The State, ex rel. Sliney.

From the Huntington Circuit Court.

W. A. Branyan, C. W. Watkins and B. W. Cobb, for appellants.

Lorz, J.—The Board of Commissioners of Huntington county granted a license to the appellant Louis Gauss to retail intoxicating liquors on certain described premises in the town of Andrews, in said county. Gauss executed a bond in the penal sum of \$2,000, with himself as principal and the appellants Wendel A. Schneur and Jacob Boos as his sureties, which was approved by the auditor of said county.

The conditions of the bond were that he would keep an orderly and peaceable house, and that he would pay all fines and costs that might be assessed against him for any violations of the law, and for the payment of all judgments for civil damages growing out of unlawful sales, as provided by section 7279, R. S. 1894.

On the night of the 13th day of September, 1890, one Alfred S. Sliney, a young man about seventeen and one-half years old, was drowned in the Wabash river. This action was brought by the State on the relation of Joseph Sliney, the father of said Alfred, to recover for the loss of his services. The bond above described is made the foundation of the action, and the breach alleged is that Gauss, through his servant and employe, unlawfully sold intoxicating liquors to the said Alfred S. Sliney and suffered and permitted him to drink the same, and that in consequence thereof he became intoxicated and fell into the river and was drowned.

There was a trial by jury and a special verdict returned on which the court rendered judgment in favor of the appellee in the sum of \$670.

The first error assigned is the overruling of the demur-

rer to the complaint. The only objection urged against the complaint is that it does not appear that the sale of the liquor was the proximate cause of the death of Alfred S. Sliney.

It is averred in the complaint that an employe, agent and representative of Gauss, unlawfully sold to said minor son intoxicating liquors, and furnished him with intoxicating liquors, and suffered him to drink the same until he became "intoxicated, crazed, and helpless bodily and mentally, and that while in this intoxicated condition he wandered about and along and into the Wabash river on his way home * * * and drowned and lost his life."

The wrong charged against Gauss is not mere negligence or nonfeasance in failing to discharge a duty imposed upon him by law, but it consists of an actual aggressive wrong, a violation of the criminal law. He made the deceased intoxicated. He set in motion a dangerous force, and must answer for the immediate results flowing therefrom.

The case of *Beem v. Chestnut*, 120 Ind. 390, was an action on a retailer's bond in which a wife averred that her husband by reason of the intoxication so unlawfully produced became crazed, and while in that condition drove her from her home, thinly clad, into the cold, whereby she was made sick, and was damaged by thus suffering pain and loss of time, and in expenses incurred in being restored to health. The court by MITCHELL, J., said: "If the expulsion of the plaintiff from her home into the cold was a direct consequence of the defendant's unlawful act, he was civilly liable for the resulting damages to the same extent as if he had expelled her with his own hands. One who in violation of law sets in motion a dangerous, uncontrolled force, must take notice of the consequences that are liable to

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follow, and be ready to answer under the statute for any damages to the person or property of those who are within its protection." *Dunlap v. Wagner*, 85 Ind. 529; *Mulcahey v. Givens*, 115 Ind. 286; *Mitchell v. Ratts*, 57 Ind. 259. The complaint is sufficient.

The next assignment of error is the overruling of the motion for a new trial. The only cause for a new trial discussed by counsel is that the verdict is not supported by the evidence. There are some facts stated in the verdict, of which there was no evidence, but as these facts are not material this affords no good reason for granting the motion. There was some evidence tending to prove the other facts found.

Another assignment is that the court erred in discharging the jury without requiring them to find all the facts in issue, and of which evidence was given. The record shows that when the jury returned the verdict, the defendants moved the court to require the jury to return to the jury room, and to find specifically certain further facts. This motion was an oral one, and is not set out in the record, and this court has no means of knowing what facts the appellants desired the jury to find.

The appellants, Jacob Boos and Wendel A. Schneur, moved the court to render judgment in their favor upon the special verdict. This motion was overruled, and this ruling is one of the errors assigned. If Gauss violated his bond in making the sale, his sureties were also liable on the bond. *State, ex rel., v. Cooper*, 114 Ind. 12; *Mulcahy v. Givens*, *supra*; *Dunlap v. Wagner*, *supra*.

If the facts found do not warrant a judgment against the defendants making the motion, it was error to overrule it. The verdict finds that the sale of the liquors was made by the clerk or employe of Gauss. The point is made that there is no finding that Gauss made the

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sale or authorized it to be made. This presents the serious question in this case. So much of the verdict (of which there was evidence tending to support) as bears upon this question is as follows:

"We further find that the said Louis Gauss, in the conducting of said saloon, hired and employed as his servant, salesman, clerk and bartender one Frank Ross.

* * * We further find that on the 13th day of September, 1890, the said Frank Ross was then and there in the employ of said Louis Gauss as clerk and bartender at said saloon in said town of Andrews, and was conducting the business of said saloon as such employee of said Louis Gauss, selling his said liquors and other articles therewith connected, and receiving the pay therefor for the use of said Louis Gauss, and so continued in his employment on said day and evening. * * *

We further find that on the said evening of the 13th day of September, 1890, the said Frank Ross, at said place of business of said Louis Gauss, * * * did sell, give and barter to the said Alfred S. Sliney, intoxicating liquors, he, the said Sliney, being then and there a minor, * * * under the age of twenty-one years, without the knowledge, presence, consent or fault of the relator; the same not being administered as medicine or by the direction of any physician or person authorized or directed; and suffered the said Alfred S. Sliney to drink said liquors in said place of business * * *, and furnished to said (Sliney) intoxicating liquors, and suffered (him) * * * to drink the same until he became intoxicated, crazed, and helpless both bodily and mentally, until his reason was dethroned temporarily by said intoxication, so that from the effects produced thereby he wandered about and along and into the Wabash river on his way home from defendant's place of business, and at or about the hour of midnight

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on said 13th day of September, 1890, and drowned and lost his life while under the effects of said intoxicating liquors."

A special verdict must find every fact essential to support a judgment, and if any such fact be wanting, the judgment must fall. Nothing can be supplied by intendment. The failure to find a fact in favor of the party upon whom rests the burden as to such fact is equivalent to finding such fact against him. *Noblesville, Gas, etc., Co. v. Loehr*, 124 Ind. 79.

There is no finding that Gauss made the sale in person, but it is not necessary to create a liability on the bond that he should have personally made the sale. There is a finding that the clerk was authorized to make sales generally and to conduct the business, and the sale made was in the line and scope of the business. The mere fact that the act was a criminal one will not relieve the principal from liability. We think the verdict sufficient to support a judgment in favor of the appellee.

A motion for a *venire de novo* was overruled. This is one of the errors assigned. A *venire de novo* will only be awarded where the special verdict is ambiguous, indefinite, or wanting in form. *Buscher v. City of Lafayette*, 8 Ind. App. 590. There are no defects of this kind in this verdict, and there was no error in overruling the motion. It is also insisted that it was error to overrule the motion to modify the judgment. The only cause assigned for this motion is that the evidence fails to support the full amount of the judgment. This cause is properly one for a new trial. As we have said, there was some evidence tending to sustain the full amount of the recovery.

Judgment affirmed.

Filed Dec. 12, 1894.

Pence v. Beckman.

No. 1,539.

PENCE v. BECKMAN.

CONTRACT.—*Declaration on Express, Recovery on Implied—Variance.*—

A recovery may be had upon the proof of an implied promise, although the complaint declares upon an express promise. In such case there is no variance.

From the Madison Circuit Court.

E. B. Goodykoontz and G. M. Ballard, for appellant.

J. W. Lovett and S. M. Keltner, for appellee.

Lotz, J.—In this action the appellee sought to recover a judgment against the appellant for the value of pasturage furnished by the appellee to appellant's live stock. The complaint is in the ordinary form, and alleges that the pasturage was furnished at the special instance and request of the defendant. Trial by jury and verdict in favor of appellee in the sum of \$130, on which judgment was pronounced.

The only assignment of error discussed by appellant's counsel is the overruling of the motion for a new trial. It appears from the evidence, that the appellant was the owner of a farm consisting of about one hundred and forty acres, all of which he leased to the appellee, except the dwelling house and garden. The appellant's live stock were permitted to pasture and graze upon said lands, with the knowledge of both appellant and appellee. Nothing was ever said between them as to pay therefor at the time.

If we understand the argument of appellant's counsel it is contended that there is a fatal variance between the allegations of the complaint and the proof; that the complaint declares upon an express special contract, while the proof establishes an implied contract. It is true that

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when a complaint declares upon a special contract there can be no recovery upon an implied one. An express contract is one in which the terms are stated in parol or in writing, while an implied contract is a matter of inference or deduction. It creates an obligation akin to duty. A special contract is one of peculiar terms or provisions. An express contract may or may not be special, but a special contract is always express. The common law rule of pleading was that a declaration in assumpsit must declare upon an express promise, but a recovery might be had on proof of an implied promise, and this seems to be the rule under the code. *Forester v. Forester*, 10 Ind. App. 680. It is true that the complaint makes use of the words "special instance and request," but these are not words of the contract itself. They merely state a conclusion of the pleader, and not a fact. The complaint may be construed as declaring on an express promise but not on a special promise. As a recovery may be had upon the proof of an implied promise, although the complaint aver an express one, there was no variance, and the motion was correctly overruled.

Judgment affirmed.

Filed Dec. 11, 1894.

No. 1,394.

THE LINTON COAL AND MINING COMPANY v. PERSONS.

NEGLIGENCE.—*Lack of Knowledge, Averment Concerning Visible Defects.*

—A servant is only bound to observe defects that are visible and apparent.

SAME.—*Diligence in Discovering Defects.*—Where one ought, by the exercise of reasonable diligence, to have discovered the existence of a certain defect, he is held to have knowledge of such defect.

SAME.—*Master and Servant.—Mining Boss.*—The mining "boss" of a coal mine and an employe under him do not stand in the relation of fellow-servants.

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SAME.—Master and Servant.—Delegating Duty.—An employer can not delegate his duty so as to escape liability, and section 12 of the act of March 2, 1891 (p. 57), does not relieve him of responsibility for failure to perform his duty.

SAME.—Master and Servant.—Mining Boss.—The mere employment of a competent mining boss does not relieve the master from a liability for an injury occasioned by the neglect of such boss.

NEGLIGENCE.—Action Under Mining Statute.—Contributory Negligence.—Complaint.—Statute Construed.—In order to state a good cause of action for negligence under the mining law of 1891, against his employer, an employe is required to allege that the negligence on account of which he seeks to recover was the proximate cause of his injury, and that he was free from fault.

DAMAGES.—Loss of Service.—Other Employment.—In assessing damages the jury may take into consideration any loss in the past or probable loss in the future of time or ability to earn money, by the plaintiff, in his usual vocation, in connection with the fact as to whether he had secured, or was likely to secure, by reasonable exertion, other suitable employment, together with the compensation received by him therefor, or which he might have received, or that he may receive.

SAME.—Loss of Service.—Increased Wages in Another Employment.—A person injured by the neglect of another is entitled to damages for the impairment of his ability, either past or future, to earn wages at his usual employment during such time as he could not, in view of his circumstances and condition, reasonably secure other suitable employment, or for the excess of wages he would probably have earned at his usual employment if he had secured, or could secure, such other employment at less wages; but for such time as he did, or could, secure such other reasonable and suitable employment, at equal or greater compensation, he would not be entitled to recover damages on account of the impairment of his ability to earn wages at his usual employment.

SAME.—Loss of Service, Subsequent Employment at Higher Wages.—The fact that the plaintiff was employed by the defendant in other than his regular vocation, after the injury inflicted, at higher wages, does not bar his right to recover damages for any loss he may suffer in the future by reason of his inability, occasioned by the injury, to follow his usual vocation.

From the Greene Circuit Court.

C. L. Holstein and C. E. Barrett, for appellant.

W. W. Moffett, C. E. Davis and W. V. Moffett, for appellee.

The Linton Coal and Mining Company v. Persons.

DAVIS, J.—In the court below, appellee recovered judgment against appellant in the sum of two thousand dollars, for damages on account of personal injuries sustained by him.

The first and second paragraphs of the amended complaint on which the trial was had, omitting the caption, are in the words and figures following, to wit:

“James H. Persons, the plaintiff above named, for amended complaint, complains of the defendant, the Linton Coal and Mining Company, and for cause of complaint says that at the time of the injuries hereinafter complained of, the defendant was a corporation duly organized under the laws of the State of Indiana, and owned a coal mine near the town of Linton, in said Greene county, known as the ‘Buckeye Mine,’ in which mine the said defendant was then engaged in the business of mining coal under the laws of said State of Indiana, and at all times, when so operating said mine, employed more than ten men therein; that said coal mine has a main shaft one hundred feet deep, from which one entry, and only one, leads out through the coal stratum, to and connecting with the rooms and working places of the miners and laborers in said mine; that the coal stratum in said mine, including that originally in said entry leading out from said main shaft, is six feet in thickness, and is all, including said entry, overlaid with strata of hard substances known as slate, rock, shale and other substances, which make and form what is known as the roof thereof; that the coal had then long since been mined from said entry, and the same was then, and for a long time prior thereto had been, used by the defendant, when operating said mine, as the passway, and only passway, for miners and laborers in said mine to pass to and from their work in said mine, and was also used by the defendant as the passway, and only passway through

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which to transmit the mined coal from the working places in said mine to said main shaft, and was the only passway in said mine for such transportation, and was the only passway in said mine through which miners and laborers could pass in going to and from their working places in said mine, and was the only passway used for that purpose in said mine; that unless all said slate and other substance forming the roof of said passway is, and was, well and carefully secured, it is, and was, liable at all times, without warning, to fall upon miners and laborers when going to and from their work in said mine, in sufficient quantities to bruise, wound and kill them; that defendant then had in its employ in said mine a mining boss named James Pascoe; that it was the duty of said mining boss, and said defendant, to see that all loose coal, slate and rock overhead wherein miners had to travel to and from their work in said mine, including the passway aforesaid, were carefully secured; that at the time of the injuries hereinafter complained of, and for three months prior thereto, the slate, rock and other substance forming the roof of said passway was cracked, loose and in a dangerous condition, and liable at any time, without warning, to fall upon laborers and miners passing thereunder to and from their work in said mine, in sufficient quantities to bruise, wound and kill them, of all of which facts the defendant had full knowledge; that said mine boss and said defendants, nor either of them, did not, prior to the date of the injuries hereinafter complained of, see that all loose coal, rock, slate and other substance overhead and forming the roof in said mine wherein miners working in said mine had to travel to and from their work therein, including said passway, were carefully secured, and safety in said mine was in all respects assured, but negligently, willfully and unlawfully failed and refused to carefully secure

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the same against falling on the miners and laborers while going to and from their work in said mine, either by properly propping said roof or removing therefrom said loose slate, or in any other way, and negligently, willfully and unlawfully permitted the roof of said passway, and the slate, rock and other substance thereof, to remain unsecured, and in a dangerous condition for miners in passing thereunder to and from their work, and negligently, willfully and unlawfully failed and refused to order and direct that no person, including this plaintiff, be permitted in said unsafe place, unless for the purpose of making it safe, or to pass therethrough, but, on the contrary, negligently and willfully permitted this plaintiff and other of its employes to repeatedly pass through and be in said unsafe place.

“Plaintiff says that on the 26th day of January, 1892, he was in the employ of this defendant as a miner in said mine, for wages, and that on said day of January, while on his way from his work in said mine, by way of said passway (which was the only passway for plaintiff and other miners to go to and from their work in said mine), and while necessarily in said passway on his way from work to which he had been assigned by defendant as one of defendant’s employes in said mine, and without any knowledge that the slate, rock and other substance forming the roof of said passway were cracked, loose or in a dangerous condition, and while in the exercise of due care, and without any fault upon his part, and without any warning to him, and being negligently and willfully permitted by defendant to pass through said unsafe passway and under said dangerous slate from his said work in said mine, by reason of the slate, rock and other substance forming the roof of said passway then being cracked and loose, and by reason of the same not having been carefully secured, or removed, or otherwise

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made safe by said mine boss and said defendants, and by reason of said mine boss or defendant not having ordered and directed that no person be permitted in said unsafe place unless for the purpose of making it safe, as aforesaid, and by reason of this plaintiff being permitted to be therein, as aforesaid, a large piece of slate fell from the roof of said passway upon the plaintiff, striking him on his head and on his back, near his hips, causing a severe contusion of the muscles in those parts, also a severe sprain of the posterior lumbo sacral vertebra, of the posterior ilio sacral vertebra, of the ilio femoral vertebra, and permanent injury to the articulation of all of same, severely bruised his back at the injured point aforesaid, and cut large and ugly wounds in his scalp, all of which has resulted in his permanent injury in those parts and in his permanent disability to work and earn wages as a coal miner or at any other manual labor; that from said injuries he has suffered great and lasting pain of body and worry of mind, has incurred a doctor bill of \$100, had to be nursed at his home two months, has lost ten months' time from his work; that he has been a coal miner for twelve years last past, and has no other profession or vocation; that he is now thirty-four years of age, has a wife, and one child four years of age; that the only source of support for himself and wife and child is, and was, through his earnings as a coal miner; that prior to his said injuries he had been free of sickness all his life, had a good constitution, good health, was industrious, and able to earn, and did earn, wages as a coal miner in the sum of \$60 per month; that by reason of all the facts in the premises he has been damaged in the sum of ten thousand dollars, for which sum he demands judgment, and for all other proper relief.

PARAGRAPH 2.

"The plaintiff, for a second and further paragraph of

amended complaint, says that at the time of the injuries hereinafter complained of, the defendant was a corporation duly organized under the laws of the State of Indiana, owned a coal mine near the town of Linton, in said Greene county, Indiana, known as the 'Buckeye Mine,' was then engaged in the business of mining coal from the mine under the laws of said State of Indiana; that said coal mine has a main shaft one hundred feet deep, from which one entry, and only one, leads out through the coal stratum, to and connecting with the rooms and working places of the miners and laborers in said mine; that the coal stratum in said mine, including that originally in said entry leading out from said main shaft, is six feet in thickness, and is all, including said entry, overlaid with a strata of hard substance known as slate, which forms what is known as the roof thereof; that the coal had long since been mined from said entry, and the same was then the only road and route in said mine over which the defendant could and did transport its mined coal from the working places therein to said main shaft, and then was the only passway through which the miners employed by defendant in said mine could and did pass in going to and from their work in said mine; that said slate forming the roof of said passway, unless safely secured by props or other means, was then, and at all times, liable to become loose and fall upon and injure miners and laborers passing thereunder in going to and from their work in said mine, which fact was then well known to this defendant; that at the time of the injuries hereinafter complained of, and continuously for three months prior thereto, the said slate forming the roof of said passway was loose, cracked and insufficiently secured by props and other means, which fact was then well known to this defendant, and was unknown to the plaintiff, and which fact rendered the same dangerous to

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miners and laborers passing thereunder to and from their work in said mine, which fact was likewise known to this defendant at that time, and said defendant, with full knowledge of all said facts, carelessly and negligently suffered and permitted said slate forming the roof of said passway to remain cracked, loose, insufficiently secured and dangerous to its employes in said mine, including this plaintiff, by then and there carelessly and negligently failing and omitting to secure the same by props, caps and timbers suitable for that purpose, or by taking down and removing the same, or to make the same safe in any other manner, and that while the same was in the dangerous condition aforesaid, this defendant carelessly and negligently directed and permitted its employes in said mine to pass thereunder, including this plaintiff, in going to and from their work therein; that on the 26th day of January, 1892, the plaintiff was in the employ of this defendant as a miner in said mine for wages, and, on said day in January, as such employe, while necessarily in said passway on his way from his work in said mine, without any knowledge of the slate forming the roof of said passway being then loose, cracked, insufficiently secured and dangerous to persons passing thereunder, while in the exercise of due care and without any fault upon his part, and without any warning to him, but by reason of the slate roof of said passway being then cracked, loose and insufficiently secured, and by reason of the defendant carelessly and negligently suffering and permitting the same to then be and remain loose, cracked and insufficiently secured, a large piece of loose slate fell from the roof of said passway upon the plaintiff, striking him on his head and on his back near his hips, causing a severe contusion of the muscles in those parts, also a severe sprain of the *posterior lumbo sacrel*, of the *posterior illio sacrel*, of the

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illio femoral, and permanent injury to the articulation of all of same, severely bruised his back at the injured point aforesaid, cut large and ugly wounds in his scalp, all of which has resulted in his permanent injury in those parts, and in his permanent disability to work and earn wages as a coal miner, or at any other manual labor; that from said injuries he has suffered great and lasting pain of body and worry of mind, has incurred a doctor's bill of \$100, had to be nursed at his home two months, and has lost ten months of time from his work; that he has been a coal miner for twelve years last past, and has no other profession or vocation; that he is now thirty-four years of age; that his only source of support for himself and family is and was through his earnings as a coal miner; that prior to his said injuries he had been free from sickness all his life, had a good constitution, good health, was industrious and able to earn, and did earn, wages as a coal miner in the sum of \$60 per month; that by reason of all the facts in the premises, he has been damaged in the sum of \$10,000, for which sum he demands judgment and all other relief."

The first error discussed is that the court erred in overruling appellant's demurrer to the first paragraph of the amended complaint.

The contention is that said paragraph shows affirmatively contributory negligence on the part of appellee.

It is averred in substance that at the time of appellee's injuries, and for three months prior thereto, the slate, rock and other substances forming the roof of said pass-way was cracked, loose, and in a dangerous condition, and liable at any time without warning to fall upon laborers and miners passing thereunder to and from their work in said mine, all of which facts the appellant had full knowledge, and that appellee without any knowledge that the slate, rock, and other substances forming

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the roof of said passway were cracked, loose, or in a dangerous condition, and while in the exercise of due care, and without any fault upon his part, and without any warning to him, was injured by a large piece of slate falling from the roof of said passway upon him. In the face of the averments that appellee had no knowledge of the condition of the roof, and that he was without fault, the court can not say on the specific facts stated that he knew, or by the exercise of ordinary care might have known, the alleged unsafe and dangerous condition of the mine roof.

It does not appear that the dangerous condition of the roof was open and obvious. The appellant was bound to make reasonable inspection to discover latent defects and danger, but this duty did not rest on appellee. *Pittsburgh, etc., R. W. Co. v. Woodward*, 9 Ind. App. 169.

He was only bound to observe defects that were visible and apparent. Although the master and servant may have the same opportunities for acquiring knowledge of defects they are not upon an equality as to the acts necessary to constitute diligence. This question is fully discussed, and the authorities collected by Judge GAVIN, in the opinion last above cited. *Chicago, etc., R. R. Co. v. Branyan, Admr.*, 10 Ind. App. 570.

It is next insisted that the negligence averred in the first paragraph of the complaint was the negligence of the mine boss, James Pascoe, and that he was the fellow-servant of the coal miner. The duties of the mining boss are prescribed by section 12 of the act of March 2, 1891; section 7472, R. S. 1894. In the next section it is provided that the owner of the mine shall be liable for any injury to person or property occasioned by any violation of the provisions of the act. Section 7473, R.

S. 1894. The first paragraph of the complaint is predicated upon the alleged negligence of the appellant, on account of the failure of the mining boss to perform the duties and take the precaution prescribed by section 7472, *supra*. The mining boss, under the allegation of the complaint, did not stand in the relation of a fellow-servant of appellee. *Brazil Block Coal Co. v. Young*, 117 Ind. 520.

The rule is well settled that the employer must use ordinary care and reasonable skill to make safe the place where he requires his employes to work.

This duty the employer can not delegate so as to escape liability. No matter by whom the duty is performed, the employer is responsible if it is negligently performed, and from that negligence injury results. The statute cited was not intended to relieve the employer of this responsibility. The purpose was to provide an additional safeguard against injury to employes in mines by requiring the operator of the mine, through the mining boss, to give special attention to the safety of the mine as a working place. It was not intended to absolve the owner or operator from liability when he employed a competent mining boss and delegated the duty to him of making safe the place where he required his employes to work. Section 13 of the act expressly provides that for any violation of the act the owner, operator, agent or lessee shall be liable to any person who is injured thereby. The violation does not refer alone to the failure to employ such mining boss, but it refers also to the failure to perform the duties specifically mentioned in section 12. *Hochstetler v. Mosier Coal and Min. Co.*, 8 Ind. App. 442.

It is urged that the second paragraph of the complaint is bad because it affirmatively shows contributory negligence on the part of the appellee, and for the further

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reason that it does not allege that the appellant did not exercise due care in the employment of its mine boss or that its mine boss was incompetent, and that appellant retained him in its service after notice of his incompetency. The position of counsel for appellant is that the mine owner or operator is not responsible for the negligence of the mine boss if he, the mine owner or operator, has exercised due care in the employment of a competent mine boss, or has not retained in his employ an incompetent mine boss after notice of his incompetency.

On this theory, as we understand it, if the owner, operator, agent or lessee should omit to take the precaution prescribed in section 12, his liability for injuries sustained by an employe, in the event no mine boss had been employed, would depend solely on the fact that he had failed to provide such mine boss, and not on the unsafe and dangerous condition of the mine, growing out of the failure to take the precautions and perform the duties prescribed by said section. On the other hand, if he employed a competent mine boss, such employment would entirely relieve the master of responsibility for injuries sustained by the employe in such cases, notwithstanding the duties and precautions prescribed in section 12, should have been wholly disregarded. In other words, the effect of the contention is that the employment of a competent mine boss is the full measure of the duty of the owner or operator of the mine in such cases.

In the second paragraph of the complaint the mine boss is not mentioned, but the negligence alleged therein is the same in substance and effect as that averred in the first paragraph. What we have heretofore said in the consideration of the first paragraph is a sufficient answer to the argument of counsel in relation to the second paragraph. The gist of the action is not the failure to employ a competent mine boss, but grows out of the failure

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of the employer to discharge the duties resting on him in relation to providing a safe working place for appellee. This duty appellant could not, in our opinion, by virtue of the provisions of the statute, delegate to the mine boss so as to escape liability on account of the failure to perform the acts therein required. The statute prescribes the care which the employer is required to exercise. The employment of a competent mine boss is not the exercise of the care. The failure of the boss to perform the duties designated in the statute is, under the statute, the negligence of the master. Aside from the statute, each paragraph of the complaint states a good cause of action. In other words the statute was not intended to lessen the duties of the master, but was intended to increase his duty to the extent of requiring him to employ a mining boss to give special attention to the condition of the mine. It was not contemplated, however, when the mining boss was employed that such employment should relieve or exempt the master from liability.

There was no error in overruling the demurrer to each paragraph of the complaint.

The next error discussed is that the court erred in refusing to give the third instruction asked by appellant, as asked, and in giving the said instruction as modified by the court. The instruction, as asked by appellant, reads as follows:

"3. The court instructs the jury that the plaintiff must prove by a preponderance of the evidence, that the defendant knew that the north entry, where it is alleged the injury to the plaintiff occurred, was in an unsafe and dangerous condition, and the plaintiff must also further prove, by a like preponderance of the evidence, that he, the plaintiff, did not know at the time the injury occurred, that said north entry was in an unsafe and dangerous condition."

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This the court refused to give, as asked, and on its own motion modified the same, and gave the following modified instruction, viz.:

“The court instructs the jury that the plaintiff must prove, by a preponderance of the evidence, that the defendant knew, or by the exercise of ordinary care might have known, that the north entry, where it is alleged the injury to the plaintiff occurred, was in an unsafe and dangerous condition, and the plaintiff must also further prove by a like preponderance of the evidence that he, the plaintiff, did not know, at the time the injury occurred, that said north entry was in an unsafe and dangerous condition.”

There was no error in this ruling of the court. It is a familiar rule that where one ought, by the exercise of reasonable diligence, to have discovered the existence of a certain defect, he is held to have knowledge thereof. *Lake Erie, etc., R. R. Co. v. McHenry*, 10 Ind. App. 525.

If appellant desired to have the jury instructed that if appellee might have known of the danger by the exercise of ordinary care he could not recover, it should have asked the court to give such an instruction. In the next following instruction the court, at the request of appellant, said to the jury that if appellee “knew, or had reasonable cause to know, that the said entry was in an unsafe and dangerous condition he can not recover in this action.”

When these instructions are considered in connection with the other instructions given on the question, the assumption of the risk and the question of contributory negligence, appellant, on the point now under consideration, has no just cause of complaint.

It is next insisted that the court erred in refusing to give the eighth instruction asked by appellant, directing a verdict for appellant.

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There is evidence in the record tending to prove that the slate known as the second layer or second draw slate in the roof of the mine at the point where appellee was injured became and was loose and liable to fall, and therefore dangerous, at and for sometime before appellee was injured by the same falling on him; that the former mine boss had actually discovered this dangerous condition and communicated the fact to the officers of appellant; that the defects and dangers mentioned were not open and obvious, but that they were latent, and were such as could have been readily discovered by reasonable inspection and examination; that such defects were unknown to appellee, but that appellant knew, or, by the exercise of ordinary care, might have known of the unsafe and dangerous condition long before the accident, and might have repaired or removed the defects and dangers.

It is not necessary to set out the evidence, but suffice it to say that we have carefully read the entire record and are convinced that there was no error in refusing to instruct the jury to return a verdict for appellant.

The next error discussed arises on giving the following instruction:

“If you find, from the evidence, such facts in this case as entitled the plaintiff to recover of the defendant damages for any injury you may find plaintiff has suffered by reason of any wrong charged against defendant in this action, then, in assessing such damages, you may take into consideration any suffering, pain, expense of physician, liability for nursing services, loss of time, loss of ability to earn money in his personal avocation at the time of the injury, and permanent derangement or impairment of plaintiff physically, that you may find from the evidence he has suffered or incurred. And in such case, if you find the plaintiff entitled to damages

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under the above rule, the further fact, if you, from the evidence, find that it is the fact, that after such injury plaintiff was able to occupy, and did occupy, a situation not requiring physical exertion to any material extent, and to earn compensation, then it will not defeat his right to recover damages for any impairment of ability to earn wages at his said usual employment that he might otherwise be entitled to."

It was not error to instruct the jury to take into consideration any loss of ability to earn money in his personal vocation on account of the injury. The court should, if asked, have instructed the jury that they might also take into consideration appellee's ability to earn money in any other business or occupation than that of a coal miner.

In other words, in assessing damages, it was proper for the jury to take into consideration, with the other elements of damages in the case, any loss in the past or probable loss in the future of time or ability to earn money, by appellee, in his usual vocation, in connection with the fact as to whether he had secured, or was likely to secure, by reasonable exertion, other suitable employment, together with the compensation received by him therefor, or which he might have received, or that he may receive.

The only serious question on this branch of the case is whether the concluding part of the instruction correctly states the law applicable to the evidence. It appears that during the year preceding his injury appellee earned as a coal miner on the average of \$38.50 per month. Within three months after his injury he was employed as check weighman in the mine, and was so employed at the time of the trial, and as such check weighman he earned \$40 per month.

Prior to the injury appellee was a strong, vigorous and

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healthy man. He was about thirty-four years of age at the time he was injured. There is evidence fairly tending to prove that he was severely injured; that his physical strength and powers of endurance have been in some material respects permanently weakened, and his capacity to pursue his usual vocation impaired. He recovered verdict and judgment for two thousand dollars. The position as weighman did not require much physical exertion. In estimating his damages on account of the impairment to earn wages at his usual employment it was proper, as we have before observed, to take into consideration what compensation he could earn in other situations. The fact, however, that at the time of the trial and prior thereto, after his injury, he did occupy a situation not requiring physical exertion to any material extent and earned compensation therein equal to or greater than his wages as a miner, was not sufficient to defeat his right to recover damages for the impairment, by reason of his injury, of his ability to earn wages at his usual employment. It may be conceded that appellee was not entitled to recover any damages on account of the impairment of his ability to earn wages at his usual employment during the time he earned compensation equal to such wages in some other employment, but he was entitled to recover for such probable loss, on account of such impairment of his ability, as he was likely to sustain in the future, as hereinbefore indicated.

If he did not have such other employment all the time, and was not by reasonable exertion able to secure other employment suitable to his condition, he was entitled to recover damages for the time he could not secure such employment or perform such duties equal to such wages as it was probable he might have been able to earn at his usual employment if he had not been injured, or if he was able only to secure such other suitable employ-

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ment at reduced wages, he was then only entitled to recover on this item the excess it was probable he might have been able to earn at his usual employment during such term. It was not necessary that all the different phases of the question should have been embodied in this instruction.

If the jury were likely to understand from the instruction that they might allow appellee compensation for the impairment of his ability to earn wages at his usual vocation during such time as he received or was able to receive equal or greater compensation for other reasonable work which he performed, or might have performed, then it was calculated to confuse and mislead the jury, and was therefore erroneous.

The instruction is awkwardly, and, perhaps, was hurriedly written. Its meaning is not clear. The language is, if you find "that after such injury plaintiff was able to occupy, and did occupy, a situation not requiring physical exertion to any material extent, and to earn compensation, then it will not defeat his right to recover damages for *any* impairment of ability to earn wages at his said usual employment that he might *otherwise* be entitled to."

Does it mean that if he had not occupied the situation as weighman he would have been entitled to recover damages for the wages he would have earned at his usual employment if he had not been injured, and therefore that the fact that he did earn compensation as weighman after he was injured would not defeat his right to recover damages for *any* impairment of his ability to earn wages as a miner during the time he was receiving such compensation?

He was entitled to damages for the impairment of his ability, either past or future, to earn wages at his usual employment during such time as he could not, in view

of his circumstances and condition, reasonably secure other suitable employment, or for the excess of wages he would probably have earned at his usual employment if he had secured, or could secure, such other employment at less wages, but for such time as he did, or could, secure such other reasonable and suitable employment, at equal or greater compensation, he would not be entitled to recover damages on account of the impairment of his ability to earn wages at his usual employment. Under such circumstances it would be evident that he could not suffer any financial loss during that time. The probable effect of such impairment on his future prospects might be an element for consideration, notwithstanding such other employment.

The language of the instruction is "will not defeat his right to recover damages for any impairment of ability to earn wages at his usual employment that he might otherwise have earned." He might otherwise—if he had not been injured, or if he had not secured another situation—have earned wages at his usual employment. His ability to earn such wages was impaired by the injury. He was entitled to recover any damage he sustained by reason of such impairment. If, however, he occupied another situation after the injury, in which he received compensation, this fact would defeat his right to recover damages for such impairment during that time to the extent, at least, of the amount of the compensation so received by appellee for such service. It was, therefore, not correct to say in substance and effect that notwithstanding he occupied such situation and received compensation therefor, such fact did not defeat his right to recover damages for *any* impairment of his ability to earn wages at his usual employment that he might have been entitled to recover if he had not secured compensation in such other situation. It was

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misleading to say that such fact did not defeat the right to recover for *any* impairment. It did defeat the right to recover for such impairment to the extent that he was not damaged thereby. In other words his damages for any impairment of his ability to earn wages at his usual employment was lessened or defeated to the extent at least that he received compensation for services which he was able reasonably to perform in another situation. In our opinion the instruction was calculated, under the circumstances of this case, to confuse and mislead the jury.

It is next urged that the court erred in admitting the testimony of William McCloud, a witness in behalf of appellee, as to the condition of the north entry nine months before the injury occurred.

Prior to April 1, 1892, McCloud was in appellant's employ as mine boss. He testified as to the unsafe and dangerous condition of the roof, when he was there, at the place where appellee was afterwards injured, and that he communicated to the president and secretary of appellant the fact that the roof was unsafe and should be repaired, and that they declined to have it repaired.

Other evidence tends to prove that appellant allowed the roof to continue in this condition until appellee was injured by its falling on him as alleged in the complaint. The testimony of the witness was competent as tending to prove the unsafe condition of the roof, and knowledge thereof on the part of appellant. Under the circumstances of this case, it was neither immaterial nor too remote.

It is not necessary to consider any other questions discussed by counsel for appellant, as they are not likely to arise again on another trial.

Appellee has assigned as cross-error the action of the

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trial court in sustaining a demurrer to another paragraph of complaint filed by him.

The only question discussed by counsel is whether, in an action for negligence growing out of the violation of provisions of section 12 of the act of March 2, 1891, it is necessary to allege want of contributory negligence on the part of the plaintiff.

The statute defines the duty of the master in relation to what he shall do with the view of securing a safe place for the miners in which to work, and makes the violation of the provisions of section 12, *supra*, *negligence per se*.

In order to state a good cause of action in such case as this the employe is required to allege in his complaint that the negligence on account of which he seeks to recover was the proximate cause of his injury, and also, in our opinion, that he was free from fault.

It is not necessary to discuss what acts would or would not constitute contributory negligence.

All we decide now is that the statute under consideration does not change the rule of pleading in this class of cases on the question of contributory negligence.

There was no error in sustaining the demurrer to this paragraph of the complaint.

The judgment is reversed, with instructions to grant appellant's motion for a new trial.

GAVIN, J., not present.

Filed Dec. 18, 1894.

Walker *et al.* v. The Board of Commissioners of Monroe County.

No. 1,407.

WALKER ET AL. v. THE BOARD OF COMMISSIONERS OF
MONROE COUNTY.

COUNTY.—*Gravel Road Bonds.—No General Liability.*—There is no general liability resting upon counties by reason of gravel road bonds issued in pursuance of the act of March 11, 1877 (R. S. 1894, section 6861).

From the Monroe Circuit Court.

J. B. Wilson and *F. H. Hatfield*, for appellants.

J. R. East and *A. M. Cunning*, for appellee.

GAVIN, J.—The appellants sued appellee upon a gravel road bond, alleging simply its execution and that it was due and unpaid, a copy of the bond being set out as an exhibit.

A demurrer to the complaint for want of sufficient facts was sustained.

This ruling constitutes the error assigned here.

The bond shows, upon its face, that it is a turnpike bond, and one of a series ordered issued by the board on July 9, 1883, in pursuance of "An act of the General Assembly of the State of Indiana, approved March 11, 1877. Acts of General Assembly, regular session, p. 82, and amendments thereto," *vide*, R. S. 1894, section 6861; R. S. 1881, section 5097.

Appellants' contention is that such a bond creates a general liability against the county because it is not, upon its face, contingent or secondary.

While it may be, by many, regarded as a somewhat anomalous and illogical holding to declare that, although the statute authorizes the issuance of a county bond, yet no general liability of the county arises therefrom, the repeated decisions of our highest courts forbid any other conclusion.

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This seems to be the first case in which the question arises in a direct action upon the bond, but the general doctrine as to the nonliability of the counties for gravel road obligations has been frequently asserted and reasserted until it can no longer be regarded as an open question.

In *Board, etc., v. Fullen*, 111 Ind. 410, the Supreme Court, by ELLIOTT, J., said, in considering the power of the board to make additional assessments when the original assessments proved insufficient: "It was not intended that the expense should be paid out of the county treasury in any event, but that it should in all cases be paid by those who received a special benefit."

And again: "It was not intended that in any event, or upon any possible contingency, should the cost be paid out of the county treasury." * * *

"The position * * of the board * * is very similar to that occupied by the common council * * in levying assessments for street improvements." There is no corporate liability, but the property assessed alone is liable.

In *Strieb v. Cox*, 111 Ind. 299, it was claimed that the two per cent. limit of indebtedness fixed by our constitution was exceeded by the issue of such bonds. The court, however, held that "Such bonds are not payable by the county or out of the general funds of the county treasury," but that a special fund is provided to meet these bonds, and they are payable out of it and no other.

In *Quill v. City of Indianapolis*, 124 Ind. 292, the same claim was asserted as to the effect of street improvement bonds. The court there decided that there was no liability upon the city for their payment except out of the special fund derived from the assessments, "the city authorities acting merely as an agency for making and collecting the assessments and as the custodian of the fund when the assessments are collected. In this they do not

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act as the agents of the city, but as special agents, to accomplish a public end. *Board, etc., v. Fullen*, 111 Ind. 410."

The principles governing *Strieb v. Cox, supra*, are relied upon as controlling, and it is declared that "the moral and legal duty of the city to pay depends upon the contingency or condition of the special fund out of which payment is to be made."

In *Board, etc., v. Hill*, 115 Ind. 316, this conclusion is reached by the court: "These two laws (Acts of 1877 and 1885) also concur in providing, clearly and unequivocally, that the corporate county shall not be subjected to nor incur any debt, liability or damages by reason or on account of * * any act done, or for any failure or omission to act, by the county board, or by the engineer or superintendent in charge of the construction of such road."

In *Spidell v. Johnson*, 128 Ind. 235, "Bonds such as those in question are not the obligations of the county."

In *Little v. Board, etc.*, 7 Ind. App. 118, this court followed these decisions.

In *Board, etc., v. Newlin*, 132 Ind. 29, the contractor recovered against the county in a suit upon his contract, but it was there expressly averred that the bonds had been sold and the avails were in the hands of the county. What is said by the court with reference to his rights against the county must be read with this averment in mind.

Did the complaint show that there were funds in the hands of the county applicable to the payment of this bond, or did it show any other dereliction of duty upon the part of the county, another question would be presented. In view, however, of these authorities, we are driven to the conclusion that since there is no general liability resting upon the county to pay, and no failure

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to perform any duty owing from it to appellants, there is no cause of action.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,343.

MILLER ET AL. v. BLUE.

BILL OF EXCEPTIONS.—*When not Properly in the Record.*—*Date of Presentation.*—The statute provides that "the date of the presentation shall be stated in the bill of exceptions," and an indorsement upon margin of the bill, signed by the judge, which states the time when it was presented, does not meet the requirements of the statute.

From the Sullivan Circuit Court.

G. W. Buff and W. R. Nesbit, for appellants.

J. T. Hays, W. S. Maple and A. G. Cavins, for appellee.

Ross, J.—This action was brought by the appellee, Daniel M. Blue, against one Edward W. Morris, and the appellants, to recover personal property alleged to be unlawfully detained by them from him. Upon a trial there was a verdict for appellee, and judgment on the verdict.

The defendant Morris refused to join in this appeal. The appellants, in their assignment of errors, have assigned four reasons for which they ask for a reversal of the judgment and proceedings of the court below. The fourth one is the only one properly assigned, namely, the court erred in overruling appellants' motion for a new trial.

Counsel for appellee insist that no questions are presented by the record under this assignment for the reason that the evidence is not properly in the record. We think the objection must prevail.

The record shows that on the 2d day of February, 1894, the motion of the appellants for a new trial was overruled, and they were granted fifty days in which to prepare and file their bill of exceptions. An entry in the record made by the clerk, as also the file mark on the bill, shows that it was filed on the 9th day of April, 1894.

The certificate of the court at the end of the bill certifies that it was signed, sealed and made part of the record April 9, 1894. On the margin on the side of the bill is found this memorandum: "Submitted to me this 8th day of March, 1894, and taken under advisement. J. C. Briggs, Judge."

There is nothing in the bill itself or the certificate of the judge showing that it had been submitted prior to the 9th day of April, 1894. The statute, section 641, R. S. 1894, provides in express terms that "the date of the presentation shall be stated in the bill of exceptions." *White v. Gregory*, by *Next Friend*, 126 Ind. 95, and cases cited.

And an indorsement upon the margin of the bill, signed by the judge, which states the time when it was presented, does not meet the requirements of the statute. *Plotz v. Friend*, 5 Ind. App. 146; *Stoner v. Louisville, etc., R. W. Co.*, 6 Ind. App. 226; *Franklin Water, Light and Power Co. v. Rouse*, 7 Ind. App. 669; *Buchart v. Burger*, 115 Ind. 123; *McCoy v. State, ex rel.*, 121 Ind. 160; *Hormann v. Hartmetz*, 128 Ind. 353.

No questions arise except such as require a consideration of the evidence, and it not being properly in the record, they can not be examined by this court.

Judgment affirmed.

Filed Nov. 27, 1894.

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THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. KLITCH.

RAILROAD.—*Negligently Discharging Passenger at Intermediate Station.—Law and Fact.—Driving in Buggy, in Cold, to Destination.—Injurious Consequences.—Proximate Cause.—Contributory Negligence.*—Where K. purchased a passenger ticket entitling her to passage from A to C, but, by the negligence of the conductor, she was discharged at an intermediate station, B, she having been informed by the conductor, and believed, that the station was C, the place of her destination, and desiring to reach her destination she procured a buggy and driver, and was driven to C, a distance of five miles, through the cold,—the court can not say, as a matter of law, that the injuries she received are not such as were likely to be anticipated as naturally flowing from the negligence of the railroad company in causing her to leave the train at B; or, if not such as would have been reasonably apprehended, that they were not the proximate result of that act; or that K was in fault in continuing her journey to C, to which place it was the duty of the railroad company to carry her in safety.

SAME.—*Reasonable Care.—Proximate Cause.—Question of Fact.*—In such case, the jury had the right to infer that the conduct of K. in continuing her journey from B to C was entirely natural and reasonable, and that the original wrongful act was, in the sense of the law, directly responsible for the train of injuries caused by it, including any illness resulting from the ride.

From the Scott Circuit Court.

S. Stansifer, for appellant.

N. Munden, for appellee.

DAVIS, C. J.—Appellee was a passenger on appellant's train from Seymour to Scottsburgh, Austin being an intermediate station about five miles from Scottsburgh. The complaint charges that she purchased a ticket to Scottsburgh, which she delivered to the conductor, and when the train, after dark, stopped at Austin, the "conductor negligently and carelessly informed plaintiff that said station was Scottsburgh, and negligently and carelessly assisted her from said train" at Austin, etc.

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There was testimony tending to prove that after she entered the train the conductor took up her ticket to Scottsburgh and that the train stopped at Austin, which was announced as Scottsburgh, and starting, stopped again, when appellee, on the information by the conductor that the place was Scottsburgh, left it with two children, one her own, a girl three years old, and the other a boy about eight years old, in her charge. The undisputed testimony is that it was after dark and cold; that appellee inquired of a lady, a stranger to her, for the residence of the friend in Scottsburgh she was on the way with the children to visit, when she was informed that she was at Austin instead of Scottsburgh; that, being a stranger and unacquainted in Austin, the lady showed her to a hotel where, after some delay and trouble, a buggy and driver were procured, and they were driven a distance of five miles to Scottsburgh, her destination, where they arrived at 10 o'clock that night. The cold and exposure of the ride made her sick, she had a very severe cold the rest of the winter, and lost time from her work. The appellee recovered \$250.

The only error assigned is that the court erred in overruling appellant's motion for a new trial.

Appellant, at the proper time, asked the following instructions:

"8. If you find for the plaintiff, then, in assessing the damages, I instruct you that you can not allow anything for plaintiff's alleged trip from Austin to Scottsburgh."

"9. If you find for the plaintiff, then, in assessing the damages, I instruct you that you can not allow anything for plaintiff's alleged suffering and sickness caused by her alleged trip from Austin to Scottsburgh."

The instructions were refused and excepted to.

The court's sixth instruction is as follows:

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"If you find for the plaintiff, it will be necessary for you to assess her damages. While the jury are not authorized by law in this case to give exemplary damages, yet if the jury find for the plaintiff, full compensatory damages should be awarded, and in arriving at compensatory damages, the jury are not necessarily restricted to the naked pecuniary loss, if any. In estimating the plaintiff's damages, in case you find for her, if you find that she acted as a person of ordinary prudence under like circumstances in taking a conveyance to Scottsburgh from Austin, considering the weather and distance, you may take into consideration her loss of time, if any, personal inconveniences in traveling by conveyance to Scottsburgh from Austin, suffering, if any, by her from cold in making this trip, her exposure and resulting sickness from making this trip, if any, suffering and distress in mind and body, all such as are the direct and proximate consequences of the wrongful acts complained of. The plaintiff can not, however, recover for any injury, inconvenience, loss or suffering which is not the direct and proximate consequence of the misconduct of defendant's servants complained of."

The giving of this instruction was excepted to.

The motion for a new trial assigned for causes the refusal to give appellant's eighth and ninth instructions, and the giving of the court's sixth instruction, as also verdict not sustained by the evidence, contrary to law. and excessive damages.

The argument of the learned counsel for appellant is based on the proposition that under the circumstances of this case the questions of proximate damages and contributory negligence were for the court, and not for the jury. In other words, the entire case, as it is presented to us, turns upon the question as to whether the court, on the facts and circumstances in this case, should have

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instructed the jury that they could not allow appellee anything on account of her trip from Austin to Scottsburgh, or for her suffering and sickness caused by that trip.

It may be conceded that when, in such cases, the evidence as to contributory negligence and proximate cause is of such a character that but one reasonable inference can be drawn therefrom, then the question involved is one for the court. *Rush v. Coal Bluff Mining Co.*, 131 Ind. 135; *Woolery, Admr., v. Louisville, etc., R. W. Co.*, 107 Ind. 381.

The great difficulty in this class of cases is in determining what is and what is not contributory negligence, and what constitutes a proximate consequence in contemplation of law.

In the case in hand do the facts and circumstances bring it within the above rule.

There is some conflict in the authorities bearing on the questions as to whether the act of appellee, in driving to Scottsburgh on that night, "was an act of ordinary care on her part," and as to whether such act was the proximate result of appellant's negligence.

The case of *Texas, etc., R. R. Co. v. Cole*, 27 Am. and Eng. R. R. Cas. 144, relied on by counsel for appellant, is in all substantial respects the same as the one under consideration with the exception that in the Texas case the plaintiff was under the protection of an adult male companion, and in that case the court held that the injuries for which damages were sought and recovered were proximately caused by her own negligence. See also *Lewis v. Flint, etc., R. W. Co.*, 18 Am. and Eng. R. R. Cas. 263.

In the case of *Brown v. Chicago, etc., R. W. Co.*, 3 Am. and Eng. R. R. Cas. 444, the Supreme Court of Wisconsin, on facts almost identical with those in this case (with the exception that plaintiff had no knowledge

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of a hotel in the vicinity where they got off), the judgment for damages for such injuries was sustained. The court, in the course of a well considered opinion, said: "In the case at bar the question to be determined is whether the negligent act of the defendant's employes, in putting the plaintiffs and their child off the train in the night time, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies. We must in considering this case take it for granted that the walk from the place where they left the cars to Mauston was the immediate cause of the injury complained of, and the negligence of the defendant in putting them off the cars was the mediate cause. We think the question, whether there was any negligence on the part of plaintiffs in taking the walk, was properly left to the jury, as a question of fact, and they found that they were guilty of no negligence on their part."

This case has been approved by our own Supreme Court. *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474; See also *New York, etc., R. W. Co. v. Doane*, 115 Ind. 435; *Lake Erie, etc., R. W. Co. v. Close*, 5 Ind. App. 444; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179 (188).

The negligence of appellant, in causing appellee to leave the train at Austin, is not questioned in this court, and she was then required to either secure a place to stay or to proceed to the end of her journey. She elected to go on, first going to a hotel and then securing a conveyance in which she was driven to her destination. There is no claim that the means she adopted were not the best that could be secured for the continuation of her journey, or that the injuries she received were not such as are likely to flow from such a ride on a dark, cold night at that season of the year.

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Now, under these facts and circumstances, can the court say, as a matter of law, that appellee was in fault in continuing her journey, or that the injuries she sustained were not the proximate result of appellant's wrongful act.

The rule, as we understand it, is that whenever, on either the question of contributory negligence or proximate cause, there may reasonably be differences of opinion as to the inferences or conclusions which may fairly be drawn from undisputed facts, such question is one of fact to be submitted to the jury. *Cincinnati, etc. R. W. v. Grames*, 136 Ind. 39; *Terre Haute, etc., R. R. v. Buck, Admx.*, 96 Ind. 346, 351.

The court can not say, as a matter of law, that the injuries she received are not such as were likely to be anticipated as naturally flowing from the negligence of appellant in causing her to leave the train at Austin, or if not such as should have been reasonably apprehended, that they were not the proximate result of that act, or that appellee was in fault in continuing her journey to the destination to which it was the duty of appellant to carry her in safety.

In the case of *Terre Haute, etc., R. R. Co. v. Buck, Admx.*, *supra*, the Supreme Court said: "The only possible practical rule is that the wrongdoer, whose act is the mediate cause of the injury, shall be held for all the resulting damages, and that the question of whether his wrong was the mediate cause is one for the jury." See *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544 (567).

In our opinion the jury had the right to infer that the conduct of appellee in continuing her journey from Austin to Scottsburgh "was entirely natural and reasonable," and that "the original wrongful act was, in the sense of the law, directly responsible for the train of injuries

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caused by it, including any illness resulting from" the ride. *Lake Erie, etc., R. W. Co. v. Close, supra.*

There was no error in either the giving or refusing of instructions.

Judgment affirmed.

Ross, J., absent.

Filed May 18, 1894; petition for a rehearing overruled Dec. 11, 1894.

No. 1,371.

NELSON, ADMINISTRATOR, v. O'NEAL.

MARRIED WOMAN.—*When not Liable for Necessaries of Life Furnished Her.*—A married woman cohabiting with her husband can not be held liable for necessaries of life furnished her, unless she expressly agrees to pay therefor and they are furnished on her credit.

From the Ohio Circuit Court.

J. B. Coles and *G. B. Hall*, for appellant.

D. S. Wilber, for appellee.

Ross, C. J.—This action was commenced by the appellee filing a claim against the estate of Henrietta Peaslee, deceased, for board and nursing. The appellant, as administrator of her estate, refused to allow the claim, and it was duly transferred to the issue docket for trial. There was a trial by the court and a finding and judgment in favor of the appellee for one hundred and thirty-two dollars.

The only error assigned on this appeal is: "The court erred in overruling the motion for a new trial."

The evidence discloses that the decedent was a married woman, the wife of Samuel Peaslee; that he provided for her a home and subsistence; that she was suffering from erysipelas and needed medical attention, care and nursing, and in order to receive such attention went

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to the home of her brother, the appellee, and was boarded, nursed and cared for by him and his wife until her death in August, 1893.

It is insisted by counsel for appellant that the evidence is insufficient to sustain the finding of the court, and that the finding is contrary to law.

The question presented by the record, as we view it, is: Can a married woman, cohabiting with her husband, be held liable for the necessities of life furnished her, except she expressly agrees to pay therefor and they are furnished on her credit? That she can not, we think is well settled. *Nelson, Admr., v. Spaulding*, 11 Ind. App. 453.

In this case there is no evidence to sustain a finding either that the decedent promised to pay appellee for her board, care and attention, or that the board was furnished or the services rendered upon her credit. Under the facts, as shown by the record, the appellee's right of recovery, if any exists, is against Samuel Peaslee, the husband of the decedent, and not against her estate.

The court, therefore, erred in overruling the motion for a new trial.

Judgment reversed.

GAVIN, J., absent.

Filed Dec. 18, 1894.

No. 1,389.

PEMBERTON v. THE STATE.

JURY.—*Voir Dire*.—*Irrelevant Question*.—In a prosecution for selling liquor to a minor it was not error to refuse an answer to the question propounded to a juryman on his *voir dire*: "Do you believe a man who is engaged in the sale of intoxicating liquors under a license is a moral man?" where it does not appear that the question of morality was in issue nor that the defendant was engaged in selling intoxicating liquors.

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SAME.—*Voir Dire—Mistake of Law—Challenge for Cause.*—The mere fact that a juror, as shown by his *voir dire*, is mistaken as to the legal effect of the filing of the affidavit and information, is not sufficient cause for challenge.

SAME.—*Competency of Jurymen.*—A juror's competency is not to be determined from one question alone, but from all he says upon the subject.

From the Grant Circuit Court.

L. D. Baldwin and *H. Oliver*, for appellant.

A. G. Smith, Attorney-General, and *A. J. Beveridge*, for State.

GAVIN, J.—The appellant was prosecuted by affidavit and information for selling liquor to a minor.

The only questions presented to us arise upon the motion for new trial, and relate to the empaneling of the jury.

One John Howard was called as a juror, and upon his *voir dire*, stated that he had no prejudice against the sale of liquors to be drunk as a beverage, if sold according to the statute; that such selling under a license was a legitimate business; that he would feel free to accept as true the testimony of one engaged in such business and give to it the same weight as to the testimony of others.

In the course of the examination, the appellant also asked the following question: "Do you believe a man who is engaged in the sale of intoxicating liquors under a license is a moral man?"

Counsel urge that if this question had been answered in the affirmative the juror would have been shown incompetent, assuming that the client was a licensed liquor seller. To support this position they rely upon *Swigart v. State*, 67 Ind. 287. Such, however, is not the law. So far as this case does lend support to their views upon this proposition it has been overruled. *Elliott v. State*, 73 Ind. 10; *Chandler v. Ruebelt*, 83 Ind. 139; *Shields v. State*, 95 Ind. 299; *Dolan v. State*, 122 Ind. 141.

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In *Elliott v. State, supra*, the law is thus declared: "But how far inquiry shall be made of a juror concerning his opinion of the morality of any pursuit or business of the accused, in the conduct of which the alleged offense may have been committed, and for what opinions in that respect he shall be set aside, must be left, in the first instance, to the direction of the judge who presides at the trial, and his decision will not be overruled unless it appear that there has been an abuse of that discretion." *Howell v. State*, 4 Ind. App. 48, announces the same doctrine. That this juror would have been competent, even had he answered the question affirmatively, is far within the rule established by the authorities above cited.

Furthermore, the question asked relates to the morality of those engaged in the sale of liquors under a license. There is nothing whatever in the record to show that appellant belonged to that class of persons. In the absence of such a showing there is nothing to indicate that appellant was, or could have been, in any way harmed by the ruling, nor was there anything to indicate to the trial judge that the question was in any degree pertinent to the facts of the case, and there was, for this reason also, no error in the ruling of which appellant can here complain. *Shields v. State, supra*.

In order to enable us to declare that error exists in the proceedings of the court below, it must so appear from the record. *Elliott App. Proced.*, sections 592, 292.

Edward M. Gaines, being called as a juror, made substantially the same statements as Howard, and was asked, in addition, if he thought the filing of the affidavit and information against defendant was some evidence that he was guilty, to which he answered: "Not necessarily." Being then asked, "Do you think it is some evidence?" He answered: "Yes, sir."

This further question was then propounded by the court: "If the affidavit and information in this case shall not be used in evidence in this cause, could you and would you give the evidence actually introduced at the trial all the weight to which it is entitled, and decide the case impartially according to the law and the evidence?" To this question the answer was "Yes."

A challenge for cause was overruled with an exception.

There was no abuse of the court's discretion in accepting this juror. The mere fact that he may have been mistaken as to the legal effect of the filing of the affidavit and information would not be sufficient cause for challenge.

If an accurate and exact knowledge of the law were required as a prerequisite to sitting on a jury, juries would be difficult to obtain.

The language of ELLIOTT, C. J., in *Butler v. State*, 97 Ind. 378, meets the case in hand: "It is true that the examination of the juror showed that he had a mistaken view of the law applicable to the defense of insanity, but it is also true that he disclosed a willingness and an ability to yield readily to the law as it exists."

We are of opinion that the court below might rightly rely upon its ability to correct any erroneous notion of the law indicated by the juror's answers.

Counsel object strenuously to the court's ruling upon the competency of one Unthank. His competency, however, is not to be determined from one question alone, but from all that he says upon the subject. *Butler v. State*, *supra*.

Thus judged, we do not think the court erred.

The case of *Fletcher v. Crist*, 139 Ind. 121, is readily distinguishable from this case by the fact that it was an application for license to sell liquor, and the morality of the applicant was directly in issue.

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We have not taken up in detail all the objections to each juror which have been presented by counsel, but the propositions already decided cover them.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,536.

THE TOWN OF ANDREWS ET AL. v. SELLERS.

APPELLATE COURT.—*Effect of Supreme Court's Order Transferring a Case.*—An order of the Supreme Court transferring a cause to the Appellate Court settles the question of jurisdiction, and is binding on the Appellate Court.

REPLEVIN.—*Affidavit, Failure to File, Effect.*—*Taxes.*—If no affidavit accompanies a complaint in replevin, the plaintiff is not entitled to possession of the property; but the action proceeds so that the title to the property or right to its possession may be determined; and a failure to aver that the property was taken for a tax does not render the complaint bad.

SAME.—*Property Taken for Taxes.*—*Trover.*—Replevin, under our statute, is a possessory action, and if it appear upon the trial that the property was taken for a tax, the plaintiff will not be entitled to it. In such a case, if the seizure was wrongful, the injured party is remitted to his action for trespass or trover or other proper action.

SAME.—*Illegality of Taxes.*—If it appear that the property was seized for taxes, the illegality of the tax can not be considered.

SAME.—*Stranger's Property Seized for a Tax.*—If the property of a person is seized who does not owe the tax, he may maintain replevin for the property against the tax collector seizing such property.

PRACTICE.—*Anticipating Defense.*—If the complaint anticipates a defense which, if pleaded by the defendant, would be a bar to the action, the plaintiff must plead facts sufficient to avoid such defense, or the complaint will be insufficient to withstand a demurrer.

TOWN.—*Power of Marshal to Collect Taxes.*—When the town marshal has received the tax duplicate of his town, and the warrants attached thereto, they confer upon him the same powers as an execution issued to him by a justice of the peace, and he may seize the property of any taxpayer on such duplicate, any place within the county wherein such marshal's town is situated.

TAXES.—*Demand Before Levy.*—A seizure of property for taxes is not

illegal because of the failure of the tax collector to first make a demand of payment of the person owing for such taxes.

From the Huntington Circuit Court.

J. B. Kenner and *U. S. Lesh*, for appellants.

J. C. Branyan, *J. F. France* and *J. S. Branyan*, for appellee.

REINHARD, J.—The appellee brought this action against the appellants to recover the possession of a colt.

The appellants demurred to the amended complaint, the demurrer was overruled and the appellants excepted. This ruling constitutes the first specification of error.

The substance of this pleading is that the appellee is the owner and entitled to the immediate possession of an iron-gray mare colt, two years old, of the value of \$200; that the appellant McVicker is acting as marshal of the town of Andrews, Indiana, and having in his possession the duplicate for warrants of said town for the collection of taxes for said town, which town claims to be a corporation, and having a charge thereon against appellee for taxes for said corporation, said McVicker did, on the — day of —, 1891, take possession of said property, and is now threatening to sell and convert said property into money and apply the same on said taxes, and now has said colt advertised for sale on the 8th day of October, 1891.

Appellee says said colt was never within the corporate limits of said town until brought there by appellant's wrongful act, and was not liable for any tax to said corporation, said property always having been on a farm outside of said town, and was never returned for taxation within said corporate limits.

Appellee further says that at the time of the levy of said writ upon said property, he was the owner of

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other personal property in said corporation more than sufficient to pay all the tax due against him in favor of said corporation, and no demand was ever made of him, either for said tax or any part of the same; that appellant McVicker, either with or without the consent of the officers of said corporation, and without appellee's consent, went outside of said corporation and unlawfully and wrongfully seized said colt, and now threatens to dispose of the same, as aforesaid; that McVicker is insolvent and irresponsible, and said corporation disclaims having authorized said seizure and conversion, which leave appellee without remedy, and the appellee may thus be irreparably injured, etc.

This appeal was originally taken to the Supreme Court, but that court, by its order, transferred the case to the docket of this court. The complaint closes with a prayer for an injunction to restrain the appellants from selling said property, etc. The Supreme Court doubtless regarded replevin as the principal action, and the prayer for an injunction as a mere incident to such proceeding, and when thus viewed the jurisdiction is doubtless in this court. At all events the order of transfer settles the question of jurisdiction in favor of this court, and we proceed to determine the issues presented by the record.

It is earnestly contended by appellants' counsel that the complaint is insufficient because it discloses upon its face that the property was taken to satisfy a tax. The statute upon which this action is predicated provides that when personal goods are wrongfully taken or detained from the owner or person claiming the possession thereof, etc., the owner or claimant may bring an action for possession. R. S. 1894, section 1286, (R. S. 1881, section 1266).

It is provided in a subsequent section that when an immediate delivery is claimed the plaintiff must make

affidavit showing, amongst other things, that the property has not been taken for a tax, assessment or fine pursuant to a statute, etc. R. S. 1894, section 1287, (R. S. 1881, section 1267).

In either case, whether immediate delivery is claimed or not, the complaint will be sufficient to withstand a demurrer without such affidavit. If the proper affidavit accompany the complaint, the plaintiff, if he also file a proper bond, is entitled to possession at once. If no such affidavit is made, the plaintiff is not entitled to possession, but the action proceeds nevertheless, so that the title to the property, or the ultimate right to the possession thereof, may be determined. In no event does the failure of the complaint to contain the averment that the property was not taken for a tax, etc., render that pleading bad on demurrer. *Payne v. June*, 92 Ind. 252; *Turpie v. Fagg*, 124 Ind. 476.

Replevin is, however, under our statute, a possessory action, and hence if it appear upon the trial that the property was taken for a tax, the plaintiff would not be entitled to judgment. *Adams v. Davis*, 109 Ind. 10; *Maple v. Vestal*, 114 Ind. 325.

Hence, if the complaint show affirmatively that the property levied upon was taken for a tax, can the action of replevin be maintained? It is true that in the present case immediate delivery is not claimed, but the action is nevertheless one in replevin. If the action can be maintained in any event it will prevent the officer from selling the property to satisfy the tax lien. It is the spirit of the law that the officer shall not be thus handicapped in the discharge of his duty. The rule that goods taken on legal process for a tax can not be retaken from the officer by the writ of replevin, is not confined to this State but prevails in other States. The party claiming to have been wronged by the alleged unlawful seizure is

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in such cases remitted to his action for trespass or trover, or such other proper action as he may select. Wells Repl., section 224.

Public policy forbids that the taxpayer should thus be allowed to arrest the operation of the law for the speedy collection of taxes, and thereby contribute to the extinction or impairment of the State's credit, and the question of the legality of the tax can not be considered in such a proceeding. *McClaghry v. Cratzenberg*, 39 Ill. 117.

"The liability of this process to vexatious use is so considerable that it has been deemed proper in some of the States, on the grounds of public policy, to provide that replevin shall not lie for the property distrained for taxes. Taking away this remedy would still leave to the party all the other remedies which are applicable to the case; and he may, therefore, still contest the validity of the tax in a suit to recover the money after it has been paid, or in an action to recover the value of his goods if the tax was collected by distress and sale." *Cooley Taxation* (2d ed.), 818.

If, in this action, the appellee claimed the immediate possession of the property, and it were made to appear, from the complaint or affidavit, that the goods sought to be replevied were seized to satisfy a tax levy, it will not be insisted, we apprehend, that the complaint would be sufficient upon demurrer. To obtain the immediate possession of the chattel, the plaintiff would be bound to show that it was not taken for a tax. The only difference between a case where immediate possession is asked and one where it is not demanded, is that in the latter case the plaintiff is required to show that he was entitled to the possession at the commencement of the action, while in the former he must also state in his affidavit that the property was not taken for a tax. In either

case, if the evidence discloses that the property in controversy was so taken, the action will not lie. This position is fully sustained by the decisions of our Supreme Court. *Adams v. Davis*, *supra*, and cases cited.

If the complaint itself discloses the taking for a tax, the question is fully presented by the demurrer. It must not be inferred, however, from what has been said, that in no case will the action of replevin lie where the goods in controversy have been distrained for taxes. The rule is not applicable, for instance, to a third person whose property has been taken for a tax for which he is in no way liable, nor to one who was not liable to be assessed for taxation. But if the rule is to be avoided, it must appear that the whole tax is illegal, for the action can only be maintained upon the assumption that the seizure of the goods is without warrant of law. *Cooley Taxation* (2d ed.), 819.

The averments of the complaint are sufficient, we think, to raise the presumption that the appellee was liable to be assessed for taxation by the town authorities. It must further be presumed, we think, that the appellee was regularly assessed, and placed upon the tax duplicate of the town; that such duplicate came into the possession of said marshal in due course of law, and that the process by virtue of which the seizure was made was legal upon its face. None of these presumptions are excluded or overcome by any of the averments contained in the complaint. Were the complaint silent upon the subject of the tax, or did it not undertake to state by what authority the appellants assumed to hold the property—in other words, if the pleader had simply averred the appellee's ownership, and that he was entitled to possession, as required in the ordinary complaint in replevin—the question now under consideration could not be raised by the demurrer.

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Where the complaint anticipates the defense which, if pleaded by the defendant, would bar the action, the plaintiff must plead facts sufficient to avoid such defense, or the complaint will be insufficient to withstand the demurrer. *Jessup v. Jessup*, 7 Ind. App. 573.

The only remaining question as to the sufficiency of the complaint is whether the appellee has sufficiently shown that the seizure of the colt by the appellants was without warrant of law. If the complaint shows this fact, it must be by reason of the averments that the colt was never within the corporate limits of the town until brought there by the act of the marshal, but was always on a farm outside of the corporate limits, and had never been returned for taxation within said corporate limits, and that the owner had sufficient other personal property in said corporation to satisfy all the taxes due by him to the same, and that no demand had been made upon him for such taxes.

The complaint alleges that the property was seized by the appellants in 1891. The seizure must, therefore, have been by virtue of taxes levied and property assessed prior to the year 1891. The present tax law was enacted at the legislative session of 1891. The law applicable to the present case must consequently have been that which was in force previous to the enactment of the present statute upon that subject.

"All the property, both real and personal, situated in any county, shall be liable for the payment of all taxes, penalties, interest, and costs charged to the owner thereof in such county." R. S. 1881, section 6447.

Incorporated towns may, by ordinance, provide that their taxes shall be collected by the county treasurer in the same manner that he collects other taxes for State and county purposes. Elliott's Supp., section 810.

Certainly, if the county treasurer were to collect such

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taxes, it could not be claimed with any degree of plausibility that he must inquire, before seizing upon an article of property to satisfy town taxes, whether such article had ever been situated within the corporate limits of the town to which its owner owes the taxes. Such treasurer would be authorized, doubtless, to seize upon any article of property found within his county of which the taxpayer is the owner, and the fact that such property had never been returned or listed for taxation can make no difference, although it may be true that the property itself is not taxable within the town. If this were not true, and if only such property could be taken as had been listed, then no subsequently acquired property of the taxpayer could be levied upon and sold to satisfy taxes previously assessed upon other property. This position could not be maintained for a moment. If, then, the treasurer of the county could properly seize any of the taxpayer's property found within his county to satisfy taxes due the town, which we are firmly of opinion he could do, it necessarily follows, we think, that the town marshal can do the same thing when the duplicates and warrants accompanying the same are in his hands for the purpose of collecting the taxes of such town, by seizure and sale of property of delinquents. In collecting taxes town marshals "have the same power to enforce collections and shall be governed by the same rules and regulations as county treasurers and county auditors." R. S. 1894, section 4388 (R. S. 1881, section 3351).

The tax duplicates and warrants attached thereto confer authority upon the marshal to seize and sell the property of the taxpayer the same as an execution issued to the sheriff confers power upon him to seize and sell personal property to satisfy such execution. *Wise v. Eastham*, 30 Ind. 133.

The power and jurisdiction of a town marshal is the

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same as those of constables in their respective counties. R. S. 1894, section 4349 (Elliott's Supp., section 828).

Constables have power to act throughout their respective counties, unless specially restrained by law. R. S. 1894, section 8054 (R. S. 1881, section 5979).

A constable may serve an execution anywhere throughout the county. R. S. 1894, section 1575 (R. S. 1881, section 1507).

The tax duplicate and warrant thereto attached has the same force as an execution, and the property of the person owing the taxes may be seized and levied upon in the same manner for the purpose of discharging the tax. Where the statute does not prescribe any rule as to when the lien shall attach, it attaches from the time the goods are distrained. Cooley Taxation, 441.

As we have seen, all property in the county is liable for the payment of all taxes, under the statute. It follows, we think, that the marshal of a town having in his hands a tax duplicate, with the proper warrant attached, is not confined, in making seizure and sale, to such property of the taxpayer as may be found within the limits of the town whose officer he is, but he may act in that behalf throughout the county. We are, therefore, of opinion that the marshal in the present case was clearly justifiable, for aught that is shown, to seize the property in controversy and sell the same for the satisfaction of the appellee's taxes.

We also think that the alleged failure of the marshal or other town officers to make a demand for the taxes before distraining the property is not sufficient to avoid the rule that replevin shall not lie when property is taken or detained for the payment of a tax. The failure to make such a demand is, at most, but an irregularity in the proceedings. The complaint does not show that the process by virtue of which the appellee's property was

taken for taxes was void in law. It does show, on the contrary, that the appellee's property was taken for a tax due from him to the appellant corporation, upon process at least *prima facie* legal, and here the controversy, so far as the present case is concerned, must end.

The demurrer to the amended complaint should have been sustained.

The appellee's learned counsel have not favored us with any argument upon this question. They seem to be laboring under the impression that the complaint is in two paragraphs, and that at least one of these is sufficient to withstand the demurrer. The record, however, does not bear them out in this assumption. The record shows that on the 24th day of August, 1891, the appellee filed his complaint, which was an ordinary complaint in replevin. The record further shows that to this complaint the appellants filed a demurrer, pending which the appellee asked and obtained leave to amend his complaint. The record then proceeds as follows: "Come the parties by their attorneys, and the plaintiff files his amended complaint, to wit." Then follows the complaint heretofore set forth in this opinion, and none other appears to have been filed.

Following the said complaint it is shown that the appellants demurred to it, and that the demurrer was sustained. This ruling was subsequently reversed by the trial court, and the demurrer was overruled, to which ruling the appellant excepted. It is true the court, in this ruling, designates the pleading demurred to as "the first paragraph of complaint in replevin," but there was no other paragraph than the one we have reviewed. The filing of the amended paragraph took the pleading first filed out of the record. *Britz v. Johnson*, 65 Ind. 561.

Judgment reversed.

Filed Nov. 27, 1894.

Mason v. Kempf.

No. 1,216.

MASON v. KEMPF.

LANDLORD AND TENANT.—Possessory Action.—Sufficiency of Complaint.

—*Expiration of Lease.*—In an action by a landlord to recover possession from a tenant, the complaint sufficiently shows that the tenancy had ceased, where it appears that the lease under which possession was acquired expired May 27, 1893, and that from that time until institution of the action, June 10, 1893, the tenant retained possession unlawfully.

SAME.—A tenancy which expires at a stated time requires no notice to terminate it.

SAME.—*Tenant Holding Over.—When not a Tenant from Year to Year.*—

A subtenant in possession, and holding over, under a lease subject to renewal, but which has not been renewed, is not a tenant from year to year.

From the Howard Circuit Court.

C. Hodson, J. C. Blacklidge, C. C. Shirley and B. C. Moon, for appellant.

M. Bell and W. C. Purdum, for appellee.

Ross, J.—This action was commenced by the appellee against the appellant, before a justice of the peace, to recover possession of real estate and damages for the detention thereof. A trial was had before the justice, and a finding and judgment for the appellee. On appeal taken by appellant to the circuit court, appellee was again successful.

Two errors have been assigned on this appeal, namely:

“1st. The appellee’s complaint does not state facts sufficient to constitute a cause of action.

“2d. The court below erred in overruling appellant’s motion for a new trial.”

Counsel attack the sufficiency of the complaint and argue at great length and with apparent sincerity to con-

vince the court of its infirmities, but we think their objection untenable.

While it is true that in actions of this character, where a landlord seeks to recover possession from the tenant, it is necessary to the sufficiency of the complaint to allege that the tenancy has ceased, the complaint in this case is not subject to that objection, for it shows clearly that the lease under which appellant acquired possession expired May 27, 1893, and that from that time until the institution of these proceedings, June 10, 1893, the appellant retained possession unlawfully.

Even were the objections urged available, had the sufficiency of the complaint been tested by demurrer, they would not avail on an assignment in this court attacking the complaint for the first time. At most, the objection is not because of the entire omission of a fact necessary to a statement of the cause of action, but rather because it is indefinitely or imperfectly stated. Taking into consideration the liberality extended to pleadings in justices' courts, the complaint is sufficient.

The evidence as to the time and manner of appellant's taking possession is conflicting, but we are forced to the conclusion that the only right which he had to possession he acquired through Asa Knox, who held under the lease executed by the appellee. That lease was subject to renewal either by Knox or those claiming under him. Appellant made no other or different contract with appellee than that contained in the lease, and he continued to occupy the premises and comply with the terms of the lease.

It is urged that at the expiration of the year designated in the lease, no new lease having been entered into, the tenancy became one from year to year, and could be terminated only by giving the notice required by section 7090, R. S. 1894.

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If we accept counsel's contention, the tenancy began May 27, 1891, and could be terminated by a notice given three months before the expiration of the year. The evidence shows a substantial compliance with this statute.

We can not, however, agree with counsel that the tenancy was one from year to year and not under the terms of the lease, but reiterate what we have already said, that his possession was under the lease and not otherwise.

A tenancy which expires at a stated time requires no notice to terminate it.

There is sufficient evidence to sustain the verdict.

Judgment affirmed.

Filed Sept. 26, 1894; petition for a rehearing overruled Dec. 12, 1894.

No. 1,400.

DEPAUW UNIVERSITY v. SMITH.

BILL OF EXCEPTIONS.—*When Not Properly in Record.*—*Time for Filing.*

—*Order-Book Entry.*—An order granting time to file a bill of exceptions after term must be made during term and must appear in the order-book. A recital of the fact in the bill of exceptions is not sufficient, nor is such a recital in the order-book, made at the time of filing the bill, sufficient.

SAME.—*Time for Filing.*—*When Not Sufficiently Shown.*—Where it appears in the bill and in the entry showing its filing that it was presented and filed "within the time allowed by the court," it is not sufficient to make it a part of the record.

EVIDENCE.—*Conflict of.*—*Question for Jury.*—If there be a conflict in the evidence, whether that of the plaintiff or defendant, or of both, it is the province of the trial court or jury to determine which is correct.

From the Marion Circuit Court.

E. Ritter and H. L. Ritter, for appellant.

F. J. VanVorhis, W. W. Spencer, W. R. Oglebay and J. L. Oglebay, for appellee.

GAVIN, J.—The only error assigned in this court is the overruling of the motion for a new trial. The insufficiency of the evidence to sustain the finding is the only cause for new trial argued.

To enable the court to determine this question, it is essential that the evidence be properly in the record. The appellee most vigorously contends that the evidence is not in the record.

The cause was tried, judgment rendered, and motion for new trial overruled at the January term, 1894, of the Marion Circuit Court. Upon April 11th, being the 33d judicial day of the March term, 1894, of said court, the bill of exceptions, incorporating the evidence, was presented to the judge and signed and filed by him, and in the bill as well as in the entry showing its filing, it is recited that these things are done "within the time allowed by the court."

There is, however, no entry of record at the January term to show what time was given to file a bill of exceptions, or that any time whatever was given.

The law is settled by many decisions of our Supreme Court, that the order granting time to file a bill after term must be made during term, and that it must appear in the order-book. A recital of the fact in the bill of exceptions is not sufficient. A recital in the order-book made at the time of filing the bill could not of course be any more effectual than the statement in the bill itself. *Applegate v. White*, 79 Ind. 413; *Benson v. Baldwin*, 108 Ind. 106; *Engleman v. Arnold*, 118 Ind. 81; *Elliott App. Proced.*, section 801.

We are, therefore, constrained by the authorities to sustain appellee's position. If, however, we were to regard the evidence as properly in the record, we could not afford appellant any relief. Counsel's argument in be-

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half of their position is based upon the following proposition of law: "If there is a conflict in the testimony introduced by a party, that testimony that is most unfavorable to the party in the conflict of his own testimony must prevail." That this is not the rule governing the appellate tribunal upon its review of the action of the trial court is adjudicated by many decided cases. If there be a conflict in the evidence, whether that of the plaintiff or defendant, or of both, it is the province of the trial court or jury to determine which is correct. *Cincinnati, etc., R. R. Co. v. Madden*, 134 Ind. 462; *Haines v. Porch*, 9 Ind. App. 413, and cases cited.

We do not find in the adjudicated cases any authority for the proposition advanced by appellant.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,295.

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OF PHILADELPHIA.**

CONTRACT.—*Incomplete in Details.*—*Letters Evidencing.*—A correspondence concerning the employment of one of the writers as a special insurance agent for a State, which does not specify definitely and with certainty the work to be performed, nor indicate how long the proposed arrangement was to remain in force, or the terms and conditions upon which it could be terminated, does not make a binding contract.

SAME.—*Acceptance of Offer.*—An acceptance of an offer to be binding must be in the words of, or must be entirely concordant with the terms and conditions of the offer, to bind the person who makes the proposition.

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From the Vigo Circuit Court.

I. N. Pierce, D. W. Henry, W. Mack, and G. M. Crane,
for appellant.

S. M. Shepard, S. R. Hamill and J. D. Early, for ap-
pellee.

DAVIS, J.—The substantial averments in appellant's complaint against appellee are that in February, 1889, appellee was desirous of obtaining the services of a person to act as agent for her in this State to work the State for her interest, attending to all special work for her, and that appellant having had large experience in insurance matters, and an extensive acquaintance in the State, proposed, in writing, to act as such agent in this State for a consideration of \$1,800 per year, as follows:

“TERRE HAUTE, IND., Feb. 2, '89.

“*Thos. H. Montgomery, Pres., Philadelphia, Pa.:*

“DEAR SIR—Your letter of January 30th at hand, and contents noted. At one time the interests of the company in Indiana were all in my hands, as a special agent through Mr. Cunningham.

“I believe he was well satisfied with me in this field. I resigned of my own accord and a young man named Wood, from my office, took my place. I believe I could now be of profit to your company by taking Indiana again all in my charge. I write to suggest this. I am well acquainted all over the State. I believe I understand what the American wants. I can easily, by employing a man who is a resident here, and been in the business with the manager, arrange so that my business in my agency will [not?] fall off any.

“I feel as though I would be willing to take the State and do my level best, not neglecting my local agency, and put the American where she belongs in Indiana.

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This is a good State, and the business of the American ought to grow. As to the compensation, I do not know what it ought to be, but I will make you the proposition to take this State and work it thoroughly, attending to all special work, for \$1,800 per year and expenses.

"I submit the matter to you; should you feel inclined to accept this, I would want to be allowed to visit the home office and get every agency from there, its history, standing, etc., so I could know just your ideas. I could commence March 1, or later if you thought best.

"Yours very truly, B. F. HAVENS."

And that appellant, during said month, received notice from appellee that his proposition aforesaid was accepted as follows:

"THE AMERICAN FIRE INSURANCE COMPANY,
"308 AND 310 WALNUT STREET,
"PHILADELPHIA, Feb. 4, 1889.

"B. F. Havens, Esq., Terre Haute, Ind.:

"DEAR SIR—I have your favor of the 1st, and am prepared to make the arrangement with you for special work in Indiana, and on the terms you name, in view of the fact that you can give more time to it than you at first supposed to be in your power to do.

"And we shall be glad to have you begin at your early convenience, and to have a visit from you as a start off.

"I imagine that much visiting of our agencies will be needed at the outset, and inspection of risks, so that we may have to continue our present course for adjustments when fires strike us.

"Yours very truly,

"THOMAS H. MONTGOMERY, Pres't."

It is further alleged that appellant proceeded to put

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his affairs in order, and notified appellee in a reasonable time after the acceptance of said proposition, that he was ready to perform his part of the agreement during the whole year thereafter, but appellee failed and refused to perform her part of agreement by furnishing work for him, but refused to do so and employed another agent to do the work; that appellant's contract was a valuable one, requiring special experience, and he was unable to obtain like services for that year though he made diligent efforts so to do.

The appellee answered in two paragraphs, the first of which, a general denial, was afterwards withdrawn. The material averments of the second paragraph are:

That at the time mentioned in the complaint appellant was acting as the local agent of appellee at the city of Terre Haute; that appellee was not desirous of employing appellant, as alleged in the complaint, and that, on the contrary, the solicitation for employment came from appellant; that the correspondence referred to in the complaint, hereinbefore set out, is but a small part of the actual correspondence which took place between the parties, and thereupon appellee proceeds to set out in the answer all the correspondence in connection with such alleged employment, from which it appears that on the 10th of January, 1889, appellant wrote to appellee that he would be pleased to attend to any special work the company could give him, and that such employment would aid him materially, and that he would do all in his power to repay any favor the company might show him. Appellee replied that should the company desire him to attend to any special work they would communicate with him on the matter. Appellant afterwards wrote appellee again, and after some further preliminary correspondence the letters set out in the complaint were

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written. In answer to appellee's letter, appellant wrote that it was his intention to visit the company about the first of March. On the third of March he wrote again that he thought he would be there within that week. On the 9th of March he wrote that he had intended to leave for Philadelphia on that day, but that he would be kept back about a week, and that it was his aim to go in on April 1st for business. The receipt of these letters was acknowledged, and on March 19th appellant wrote as follows:

"AGENCY AT TERRE HAUTE, IND., March 19, 1889.

"*Thos. H. Montgomery, Pres't, Philadelphia, Pa.:*

"DEAR SIR—Will you be west during March? When I first notified you that I would take Indiana I had a young man to put in my place here at home. I lost him on account of my delay. I have another one now who is anxious to come with me, and I think he will be a better man than the one I missed. He has another offer, and I would not need him in case anything should occur that you would not wish my services. And if you can let me know by wire, on receipt of this letter, when and at what place I will be able to see you, I will be obliged. I want to suggest another thing, that I did not, as I firmly thought day by day for many days I would get east, and that is that I would like to do the whole work, the adjustments and other work. I think I can do it, and can fully explain to you why I am so anxious to.

"Yours very truly,

"B. F. HAVENS."

The president replied that he could not then decide on his plans for a trip. On March 25th appellant wrote that he was in first class shape with his home agency, and that he would be able to go to work on April 1st, and that he was confident he could render the company

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good services, and that he would like to have the settlement of the losses and make a clean thing of the whole business. The appellee replied as follows:

"THE AMERICAN FIRE INSURANCE COMPANY,

"308 AND 310 WALNUT STREET,

"PHILADELPHIA, April 1, 1889.

"*B. F. Havens, Esq.:*

"DEAR SIR—On my return home, I have your favor of the 25th of March before me. Your delays in getting here were the inducement to seek other arrangements for special work in Indiana, as we can well care for adjustments under our present system, in which we desire no change. Hence we are not prepared to confer with you further at this time on the subject of our Indiana work.

"Yours very truly,

"THOS. H. MONTGOMERY, Pres."

It is further alleged that there was no other or different correspondence in relation to any alleged employment of appellant by appellee, and that there was no other or different writing, proposition or pretended agreement between the said parties, and that there never was at any time any oral contract or agreement made and entered into between the parties looking to an employment of or contracting with appellee by appellant for special work in the State of Indiana, and that appellant did not at any time make any agreement with appellee for special work, and that appellant, during said alleged time from March 1, 1889, to March 1, 1890, was constantly employed in other business which occupied his whole time and attention, and from which he realized large incomes and profits.

A demurrer was overruled to this answer, and the appellant failing and refusing to plead further, the court rendered judgment on said demurrer.

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This ruling presents the only question for the consideration of this court.

Counsel for appellant insist that the second paragraph of the answer does not state facts sufficient to constitute a defense to the cause of action alleged in the complaint; that the correspondence shows that the minds of the parties have fully met on every essential to the contract; that the character of the work, the amount of the consideration and the time for beginning are fixed; that there is no misunderstanding of terms, no preliminaries to be settled between them, and that the contract is complete.

The contention is that the correspondence set out in the complaint conclusively shows that the parties did enter into a contract, and that their minds did meet on all the essentials to the contract, and that where the parties have agreed to all the essentials to a contract, the contract continues until there is a revocation by one or both of the parties, and that whatever may have taken place between the parties after that time could not change that fact; that the agreement, being unambiguous, does not need an explanation, and the subsequent letters set out in the answer can not be used for that purpose.

It is well settled that a proposition made by one party by letter to another party at a distance, containing a specific offer which is unconditionally accepted by the latter, will constitute a valid contract between them.

The primary question in such case is whether the correspondence shows an agreement upon which the minds of the parties met, or whether the negotiations are inchoate and unperfected until something should intervene and be determined in order to give it full effect. *Myers v. Smith*, 48 Barb. 614.

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Counsel for appellee rely upon the case of *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.), 494. This was an action brought by the Commercial Telegram Co. to restrain James D. Smith, as president of the New York Stock Exchange, and others, from interfering with the right of the plaintiff to collect upon the floor or premises of the New York Stock Exchange the quotations of dealing made at such exchange, and the distribution of said quotations to its customers, and the claim of the plaintiff was founded, as in the case at bar, solely upon correspondence between the parties. Some preliminary letters passed between the parties, and, on April 25, 1883, the following letter, with the matters not pertinent omitted, was sent to the plaintiff:

“COMMITTEE OF ARRANGEMENTS,
“NEW YORK STOCK EXCHANGE,
“NEW YORK, April 25, 1883.

“*Luther E. Shinn, Vice-President Commercial Telegram Co.:*

“DEAR SIR—I am instructed to forward to you the following plan, adopted by the governing committee, which will form the basis of an agreement with you in the matter of your proposed service upon the floor of the exchange, viz:

“*First.* A rental shall be paid by any telegraph company at the rate of \$18,000 per annum, payable monthly in advance.

* * * * * *

* * * * * *

“Respectfully, GEO. W. ELY,
“Secretary of Committee.”

On the following day the plaintiff answered this letter as follows:

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"THE COMMERCIAL TELEGRAM COMPANY,

"EXECUTIVE OFFICES.

"EQUITABLE BUILDING, 120 BROADWAY,

"NEW YORK, April 26, 1883.

"Geo. W. Ely, Esq., Secretary Committee of Arrangements, New York Stock Exchange:

"DEAR SIR—Your communication of April 25th is received. I am instructed by our executive committee to say in reply, that the plan set forth in your letter is entirely satisfactory to this company; that we accept the same, and are ready to execute an agreement upon the basis proposed, whenever prepared and submitted to us.

"I am, very truly yours,

"LUTHER E. SHINN,

"Vice-President and Gen. Man."

The court held that the letters did not constitute a contract. We quote from the opinion as follows:

"It is claimed upon the part of the plaintiff that the letter of April 25th contained an entire contract and that upon the acceptance of its terms by the letter of April 26th of the plaintiffs, it became a complete contract, binding upon both parties. It is very important to observe in this connection that although the claim is made upon the part of the appellant that these papers constitute an entire and complete contract, it is admitted upon its own points that there are exceptions as to its completeness, namely, that there is no provision as to the time it should remain in force nor as to the terms and conditions upon which it could be terminated. These deficiencies seem to have struck the counsel for the appellant, they being as they admit essential to the contract; but it is claimed that the law supplies the omission and a perpetual grant is to be inferred because the plaintiff could * perpetually perform the service and because it would be of advantage to the plaintiff to have such a

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grant rather than one limited in duration. We know of no rule of law applicable to those cases where grants of privileges are silent as to their duration, which measures the duration of such grants by the capacity or rapacity of the grantee. The very fact of the absence of these essential elements seems to indicate beyond question that the papers under consideration, if there was no other reason, could not be interpreted as containing a contract * * binding upon both parties."

In the New York case the alleged letter of acceptance says: "I am instructed by our executive committee to say, in reply, that the plan set forth in your letter is entirely satisfactory to this company; that we accept the same, and are ready to execute an agreement upon the basis proposed, whenever prepared, etc." * *

In the case before us the corresponding letter contains the following language:

"I have your favor of 1st, and am prepared to make the arrangement with you for special work in Indiana and on the terms you name." * *

In the case of *Myers v. Smith, supra*, the action was brought on a contract claimed to have been made by correspondence, in which the letters were as follows:

"*J. Myers, Esq., Ilion:*

"DEAR SIR—Yours of the 15th inst. came to hand, and I have refrained from answering till now, expecting to hear from parties I was negotiating with, before receiving your letter. The malt I have for sale is at Weedsport. I will sell you ten thousand bushels of the malt, 34 pounds to the bushel, 2½ per cent. off for screenings, at (\$1.54) one dollar and fifty-four cents per bushel, delivered * at Weedsport. Answer by return mail, and direct the letter to Weedsport. Respectfully yours,

"THOMAS SMITH,

"per G. O. SMITH."

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This letter was answered within an hour of its receipt, and the reply was as follows:

“ILION, June 20, 1864.

“*Thomas Smith:*

“DEAR SIR—Your letter under date of June 18th came to hand this Monday forenoon. I will take your malt, ten thousand bushels, deliverable on boat at Weedsport, at 154 cents for 34 pounds to the bushel, and 2½ off for dust or screenings. I will be up as soon as I can get away from home, which will be the last of the week or the fore part of next week.

“Respectfully yours,

“J. MYERS.”

The court in this case held that there was a variance between the proposal and alleged acceptance in the use of the words “delivered” and “deliverable,” and that the proposed visit of the plaintiff to the defendant carried with it the necessary implication that it was for the purpose of inspecting the malt prior to a close of the negotiations. The language of the court is as follows:

“An acceptance must be in the words of, or must be entirely accordant with, the terms and conditions of an offer, to bind a party who makes the proposition. In this case, the variance made the acceptance a different thing from the offer. As thus expressed, it could not have been claimed by the defendant to be binding on plaintiff, and he could not have maintained an action for its alleged breach; and for this reason, as well as upon the ground that there was a contingency expressed in the letter, to wit, the visit of the plaintiff to the defendant and an inspection of the malt prior to a full close of the negotiation, the defendant could not have enforced it as a valid contract against the plaintiff, if he had repudiated its obligations.”

In the case of *Martin v. Northwestern Fuel Co.*, 22 Fed.

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Rep., 596, a proposition was made by the plaintiff, by telegraph, to sell coal at a certain figure, to which the following reply was made: "Telegram received. You can consider the coal sold. Will be in Cleveland next week and arrange particulars."

The question before the court was whether these two dispatches made a definite contract between the parties—whether there was a direct unqualified acceptance of the terms offered. The court held that there was not (after citing approvingly the case of *Myers v. Smith*, *supra*) in the following language: "So it seems to me that the telegram carrying to the proposed vendor a statement from the supposed vendee that he will come to Cleveland, to his place of business, and arrange particulars, carries with it a fair implication that the particulars are to be arranged before the contract is finally consummated."

In construing the phrase, "You may consider the coal sold," Judge Brewer, now on the supreme bench of the United States, in *Martin v. Northwestern Fuel Co.*, *supra*, decided that the expression was not a natural one when a definite acceptance of an offer was intended, but was more equivalent to this: "There is so little to be settled, and I am so sure that all can be arranged, that you are safe in looking upon the sale as closed, and prepare to make your arrangements accordingly. You may consider—you may understand—that this contract is going to be consummated, and that I will come to Cleveland and we will fix it up."

It is not necessary to go to the full extent of these authorities in this case.

In this case the special work referred to in the correspondence is not made therein certain and definite. There is no provision made indicating how long the pro-

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posed arrangement was to remain in force or the terms and conditions upon which it could be terminated.

Under the circumstances disclosed in the answer, it is proper to look at the whole correspondence between the parties in relation to this subject-matter in order to determine the intention of the parties.

In the letter of appellant written on the 19th of March, 1889, he says:

"I would not need him in case anything should occur that you would not wish my services."

This language, in connection with his desire to see the president in order to make an arrangement "to do the whole work, the adjustments and other work" is significant as tending to show that he did not regard the contract as complete.

The only language indicating an acceptance of appellant's proposal, is the expression in appellee's letter: "I am prepared to make the arrangement with you for special work in Indiana." There was no unqualified and unequivocal acceptance of appellant's proposition in terms. It is simply equivalent to saying: "I am ready to execute agreement on terms proposed by you when details are settled." This is evidently the manner in which appellant understood the correspondence.

In our opinion, there was no error in overruling demurrer to answer.

Judgment affirmed.

Filed Nov. 27, 1894.

The Louisville, New Albany and Chicago Railway Co. v. Johnson.

No. 1,027.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. JOHNSON.

JUDGMENT.—*Motion in Arrest of.—Sufficiency of Complaint.—Killing Stock on Railroad.*—If a complaint in an action for damages against a railroad company for the killing of stock does not aver that the accident occurred within the county where the action is brought, the defect may be taken advantage of by motion in arrest of judgment.

From the Washington Circuit Court.

E. C. Field and *W. S. Kinnan*, for appellant.

S. H. Mitchell and *R. B. Mitchell*, for appellee.

DAVIS, C. J.—This suit was brought in the circuit court of Washington county for damages on account of a colt being killed on appellant's railroad track. The action is based on the statute. R. S. 1881, sections 4026, 4031.

It is alleged in the complaint, that the colt came upon the right of way and track at a point where the railroad was not fenced, but it is not averred that the accident occurred in Washington county.

The appellee recovered judgment in the court below.

Three errors only are discussed in this court:

1. Overruling appellant's demurrer to the complaint.
2. Overruling appellant's motion for a new trial.
3. Overruling appellant's motion in arrest of judgment.

The only cause assigned in the demurrer is that the complaint does not state facts sufficient to constitute a cause of action.

The only defect pointed out in argument is the failure to allege that the colt was killed in the county in which the action was commenced.

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This demurrer does not raise the question sought to be presented. *Lake Erie, etc., R. W. Co. v. Fishback*, 5 Ind. App. 403, and authorities there cited.

Is this question properly presented by the motion in arrest of judgment?

In *Toledo, etc., R. W. Co. v. Milligan*, 52 Ind. 505, Judge BUSKIRK, speaking for the Supreme Court, says: "The rule, as applicable to the case in judgment, may be stated thus: In an action under the statute, the complaint should aver that the animals were killed or injured in the county where the action is brought. If the complaint omits such averment, the objection may be raised by demurrer, assigning therefor want of jurisdiction, or by answer; but the failure to so raise it will not amount to a waiver, and the question may be raised by a motion in arrest of judgment or by an assignment of error in this court that the court below did not possess jurisdiction of the subject-matter of the action." See *Louisville, etc., R. W. Co. v. Davis*, 83 Ind. 89; *Indianapolis, etc., R. R. Co. v. Renner*, 17 Ind. 135; *Evansville, etc., R. R. Co. v. Epperson*, 59 Ind. 438; *Loeb v. Mathis*, 37 Ind. 306; *Leary v. Langsdale*, 35 Ind. 74.

The decision in *Toledo, etc., R. W. Co. v. Milligan*, *supra*, has not been overruled or modified, and measured by that rule the court erred in overruling the motion in arrest.

Judgment reversed.

Filed Mar. 9, 1894; petition for a rehearing overruled Dec. 11, 1894.

The Continental Insurance Company v. Chew.

No. 1,204.

THE CONTINENTAL INSURANCE COMPANY v. CHEW.

INSURANCE.—Forfeiture of Policy.—Waiver.—Receiving Overdue Premium.—If an insurance company accept a premium overdue, with knowledge that loss has occurred within the time the premium was overdue, it thereby waives the forfeiture and restores the policy to its full force and effect, not only as to the future but from the beginning.

SAME.—Application, Erroneous Statement in, Made by Insurance Agent.—Warranty.—An answer in the application stating that the insured held title by warranty deed when in fact she held title by descent, even if it amounts to a warranty, will not avoid the policy where it appears that a correct answer was given, but that the agent who wrote the application, probably through some misconception as to the force and purport of the question, wrote an incorrect answer of which the insured had no knowledge.

SAME.—Notice of Loss.—Denial of Liability.—Waiver of Proof of Loss.—A denial of liability by the insurance company after notice of loss obviates the necessity of furnishing proofs of loss.

SAME.—Amount of Insurance Distributed.—Recovery.—Where the amount of the policy is distributed \$450 to house and \$150 on personalty, the amount of recovery for loss of personalty can in no event exceed \$150.

EVIDENCE.—As to Contents of Letter.—Notice.—A witness may testify to the contents of a letter written to him by defendant, on preliminary proof of loss having been made; and the letter not being in defendant's possession, notice to produce it was not necessary.

From the Henry Circuit Court. .

J. Brown, W. A. Brown and T. Bates, for appellant.

L. P. Mitchell and M. E. Forkner, for appellee.

GAVIN, J.—The appellee recovered judgment against appellant upon a fire insurance policy. The premium was \$15, payable \$3 in cash and \$3 annually in advance, a note for the deferred payments being given. The policy provides that the company shall not be liable for any loss occurring while any part of the premium is overdue and unpaid. The note contains a provision of the same import.

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It is well settled that provisions of this kind are valid and enforceable, and that under them the failure to pay the premium when due is a sufficient defense to an action upon the policy to recover for a loss happening during the time when such premium is thus overdue and unpaid. *American Ins. Co. v. Henley*, 60 Ind. 515; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Continental Ins. Co. v. Dorman*, 125 Ind. 189.

The establishment of this rule does not, however, by any means foreclose the company from waiving the right which is thus given it, nor is there anything in the decisions of the various cases which we have cited which forbids such waiver.

Although the company has a right to rely upon such default by the insured as a defense, if it, with knowledge of a loss, accepts the premium, it thereby waives the forfeiture and restores the policy to its full force and effect. Such acceptance does not simply revive the policy as to the future, but it thereby restores to it its power and force from the beginning.

Whatever may be the holdings in some jurisdictions, the question can not be regarded as an open one in Indiana.

It has received quite a full and thorough investigation at the hands of our Supreme Court, and in an opinion by ELLIOTT, J., it was adjudged that in such cases the insurance company could not take the benefit without assuming the burden, but must, if it accepts the premium, respond for the loss. *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84.

The principle of waiver asserted in this case has been approved by the same court in *Michigan, etc., Ins. Co. v. Custer*, 128 Ind. 25, and *Replogle v. American Ins. Co.*, 132 Ind. 360.

To the same effect are *Joliffe v. Madison, etc., Ins. Co.*,

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39 Wis. 111; *Smith v. St. Paul, etc., Ins. Co.*, 3 Dak. 80; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325.

In the application, in answer to a question, it was stated that the insured held title by a warranty deed. An answer and the evidence show that this was not strictly true, but that she held title by inheritance from her husband, who had a warranty deed and died intestate, seized of the property, leaving as his heirs his widow and several of their children. It is claimed that this statement of her title was a warranty, the breach of which avoids the policy. A careful examination of the terms of both application and policy leaves it at the most extremely doubtful whether there is any warranty of this fact at all. *Indiana, etc., Ins. Co. v. Rundell, Admr.*, 7 Ind. App. 426; *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85.

Passing this question, however, if the statement be regarded as a warranty, the reply and the evidence show that the facts concerning the title were well known to the agent who took the application, and that true answers were made to the questions by the appellee, who could not write, but that the agent who wrote the application, probably through some misconception as to the force and purport of the question, wrote an incorrect answer of which appellee had no actual knowledge. Under such circumstances the company must bear the results of the fault of its own agent. *Howe v. Provident, etc., Soc.*, 7 Ind. App. 586; *Phenix Ins. Co., etc., v. Lorenz*, 7 Ind. App. 266; *Michigan Mut. Life Ins. Co. v. Leon*, 138 Ind. 636; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Steele v. German, Ins. Co.*, 93 Mich. 81; *Robison v. Ohio, etc., Ins. Co.*, 93 Mich. 533; *Wich v. Equitable, etc., Ins. Co. (Col.)*, 31 Pac. Rep. 389; *McMurray v. Capital Ins. Co. (Iowa)*, 54 N. W. Rep. 354.

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We find nothing in *Robinson v. Glass*, 94 Ind. 211, which controverts this proposition.

No "proofs" of loss were made, as required by the terms of the policy, but the complaint alleges a waiver by the denial of liability through appellant's general agent when notified of the loss. Such a waiver obviates the necessity of furnishing proofs. *Commercial, etc., Assur. Co. v. State, ex rel.*, 113 Ind. 331; *North British, etc., Ins. Co. v. Crutchfield*, 108 Ind. 518; May Ins., section 469.

Counsel deny the sufficiency of the proof upon this question. Without stopping to determine the extent of the authority of the local agent, we think it clear according to his own evidence that his denial of liability was authorized by those in charge of the general offices to whom he communicated the fact of the loss. By his denial, he only repeated the statement made to him in the letter written him from the general office.

The company has consistently and continually persisted in its denial of the validity of the policy at the time of the loss, from that time to the present, and thereby waived the proofs.

This court can not weigh the evidence to decide where lies the preponderance, but is only called upon to determine whether or not there is some evidence, either direct or inferential, fairly sustaining every fact essential to the maintenance of the finding or verdict. *Haines v. Porch*, 9 Ind. App. 413; *McDaneld v. McDaneld*, 136 Ind. 603.

Under this rule, we can not say the finding is unsupported by the evidence.

The policy provides for \$450 insurance on the house, and \$150 on the contents. Thus there was not a general or blanket policy of \$600 on both house and contents, but separable contracts for insurance to the amount of \$450

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on the house, and \$150 on the personalty. *Nappanee Furniture Co. v. Vernon Ins. Co.*, 10 Ind. App. 319.

There is also in the policy a provision that the company shall not be liable for an amount beyond the value of the interest of the assured in the property insured.

It is conceded by counsel for the appellee that she owned but a one-third interest in the realty, and that consequently she was entitled to recover on account of the building, the value of which was \$400, only the one-third thereof or \$133.33.

The amount of the recovery was \$433.34. Counsel seek to justify this amount upon the theory that appellee is entitled to the full value of the personal property destroyed, which was shown to be \$300.

This position, however, can not be maintained, because she could not in any event recover on account of the loss of the personalty more than the amount of insurance distributed to it in the policy.

There was no error in permitting a witness to testify to the contents of a letter written to him by appellant, the proper preliminary proof as to loss having been made. The letter was not in appellant's possession.

There was, therefore, no necessity for serving a notice upon appellant to produce it under section 486, R. S. 1894, section 478, R. S. 1881.

Since the amount of the finding can not be approved, the judgment is affirmed, at the costs of appellee, upon condition that she remits \$150 of the judgment, as of the date thereof, within fifty days. Otherwise it will be reversed.

Filed Oct. 19, 1894.

Union Central Life Insurance Company v. Woods.

No. 1,016.

UNION CENTRAL LIFE INS. CO. v. WOODS.

LIFE INSURANCE.—Deduction of Indebtedness.—Loan to Insured.—Policy Payable to Wife.—Maturity.—A policy of life insurance was made payable to the insured in a certain sum, "for the term of his natural life, or until prior maturity, for the benefit of the insured if living at" its maturity. If the insured died before the maturity of the policy, the amount named therein was payable to "his wife, if living, otherwise to the executors, administrators or assigns of the insured." The policy matured in fifteen years. It was also a condition of the policy that "In case of the death of the insured prior to the maturity of" the policy, it being in force, the company would pay the amount therein named within sixty days after receipt of notice, "the balance of the year's premiums, if any, and all other indebtedness, being first deducted." The insured died before the maturity of the policy, his wife surviving him; he, at the time of his death, being indebted in a large sum to the insurance company for money borrowed.

Held, that the amount owed by him for money borrowed could not be deducted from the amount due the wife on the policy, and that she was entitled to receive the full amount of the policy, less the remainder of the year's premiums and any other unpaid premium; that the phrase "other indebtedness" meant premiums due and unpaid for any other year than the year of the insured's death; and that the word "maturity" referred to the maturity of the policy during the lifetime of the insured.

SAME.—Deducting Amount of Loan Made from Policy.—Validity of Such a Contract.—A contract providing that the amount of any loan made by the insurer to the insured should first be deducted from the amount due him or the beneficiary under the policy, is valid.

SAME.—Endowment Policy.—An endowment policy is one providing for the payment of the sum insured to the person insured if he live to a certain time, or, if he die before that time, to some other person nominated in such policy.

SAME.—Title to Endowment Policy.—The title of an endowment policy, payable to a husband, if living at its maturity, or to his wife, if he die before such maturity, does not vest in her absolutely upon its execution, nor until his death, during the period before its maturity; and she can not be divested of such contingent interest without her consent. He also has a contingent interest by which he may divest himself of all his rights under the policy, which will bind him if he survive its maturity.

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SAME.—Construction of Policy of Indemnity.—Where indemnity is the object for which the insurance is effected, the contract must be liberally construed to that end; and if the language of the policy is equally susceptible of two interpretations, the one giving greater indemnity and sustaining the claim will be adopted.

SAME.—Assignment of Policy.—Law of Place.—The assignment of a policy of life insurance in this State, like any chose in action, is governed by the law of this State, though the policy is issued and payable in another State.

SAME.—Assignment by Married Woman as Surety for Her Husband.—The assignment by a married woman of a policy of life insurance within this State, issued on the life of her husband, to secure a debt owed by him, is void, although such policy was issued and payable in a State where a contract of suretyship, if entered into there, would have been valid.

SAME.—Assignment of Policy.—Chattel Mortgage.—An assignment of a life insurance policy "and all sum or sums of money that may become due by virtue thereof," can not be construed as a chattel mortgage placed upon such sum or sums of money; and if executed by a married woman in this State to secure her husband's debt, it is void, although such sum or sums of money are payable in a State where a married woman may execute a chattel mortgage to secure his debt.

SAME.—Waiver of Forfeiture.—Collection by Suit of Premiums Past Due.—If an insurance company sue upon and collect by execution the amount of a note given for the premium of a policy, instead of insisting upon a forfeiture of the policy, it will be deemed to have waived its right to insist upon the forfeiture as a defense.

From the Knox Circuit Court.

C. L. Holstein, C. E. Barrett, G. G. Reiley, W. M. Ramsey, L. Maxwell, R. Ramsey and M. R. Waite, for appellant.

M. W. Fields, L. C. Embree and J. W. Ewing, for appellee.

REINHARD, J.—The appellee sued the appellant in the Gibson Circuit Court to recover the proceeds of an insurance policy on the life of her deceased husband, of which policy she was the alleged beneficiary. The venue of the cause was changed to the Knox Circuit Court. The appellant filed an answer in eleven paragraphs, to each of which a demurrer was sustained, and upon appellant's

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refusal to plead further, judgment was rendered in favor of the appellee for \$2,994.78. The ruling of the court upon the demurrer is the only error relied upon.

Some of the paragraphs of the answer are in the nature of set-offs, based upon a provision in the policy which permits the appellant to deduct certain indebtedness from the insurance money. The provision just referred to reads as follows:

"In case of the death of the insured prior to the maturity of this policy, the same being in force, the company will pay the amount herein named within sixty days after receipt of notice and satisfactory proof of death, the balance of the year's premium, if any, and all other indebtedness being first deducted."

It is alleged in the paragraphs referred to that at the time of death of the insured, Isaac Woods, he was indebted to the company for borrowed money in an amount equalling that of the insurance, and it is asked that this debt be set off against and deducted from the amount of the insurance designated in the policy.

The policy provides that the company, in consideration of "the annual payment of the sum of \$161.04 at the home office of the company, on or before the 19th day of October, at noon, in every year during the term of fifteen years, does insure the life of Isaac Woods, of Princeton, in the county of Gibson, State of Indiana, in the sum of \$3,000 for the term of his natural life, or until prior maturity, for the benefit of the insured if living at the maturity of this policy. In case of the death of the insured prior to such maturity, said amount of insurance shall be payable to Mary E. Woods, his wife, if living, otherwise to the executors, administrators, or assigns of the insured."

Whether the appellant was entitled to set off the

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amount loaned the insured in his lifetime depends upon the terms of the contract and the meaning of the language "all other indebtedness" therein contained.

The facts pleaded show that the loan of \$2,300 by the company to the insured was not made until some time after the issuing of the policy, and that it was effected partly to enable the insured to pay the premiums and to revive the policy which he had suffered to lapse, when the loan was made, though the greater portion was not for that purpose.

We see no valid reason why an insurance company and an applicant for life insurance may not enter into a binding agreement to the effect that the company will undertake to loan the insured a sum of money as well as to insure his life, and that the money loaned is to be deducted from the proceeds of the policy at the time of the maturity thereof. Such a contract is not in violation of the principle of indemnity upon which insurance is generally based, for the money may be needed for the payment of premiums and other purposes to enable the insured to secure the full benefit of such insurance. Hence, if the contract in suit had provided in terms for a loan of money, and a repayment of the same out of the proceeds of the insurance, we think such a provision would be binding upon all parties, although the policy be written for the sole benefit of the wife. It is true that in ordinary life insurance, where the wife of the insured is the beneficiary, the title of the policy vests in her immediately upon execution and delivery thereof, and no arrangement between the company and the insured affecting the interest of the wife in the insurance money, which is not provided for by the terms of the policy itself, will be binding upon her. *Harley, Admr., v. Heist*, 86 Ind. 196; *Pence, Admr., v. Makepeace*, 65 Ind. 345; *Bliss Life Ins. (2d ed.)*, p. 517, section 318.

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We think it is otherwise, however, where the policy expressly provides for a restriction or limitation of the wife's interest, or makes it depend upon a future contingency, such as an arrangement for a loan of money from the company to the husband and a repayment of the same out of the proceeds of the policy, when due. Whatever may be considered the true consideration underlying the insurance, the wife can not be said to possess a greater interest in the policy than is given her by the terms thereof. When she acquires the title to the same, upon execution and delivery, she takes such title burdened with all its conditions and limitations. She can receive no more insurance, in other words, than the insured has contracted for in her behalf. If the insured has, therefore, stipulated for a loan to himself, to be paid out of the insurance money when it becomes due, by an acceptance of the policy she assents to the deduction of such loan from such proceeds, and she can not afterwards be heard to deny the company's right to make such deduction.

It is not claimed, however, in the present case, that the policy in terms provides for a loan of money to the insured and the repayment of the same out of the insurance money, nor is there, in point of fact, such a stipulation. What the appellant does contend is that the provision in the policy permitting the company to deduct from the amount of the insurance money the balance of the year's premiums, "and all other indebtedness," is broad enough to confer upon the company the right to make such a loan to the insured and secure itself by withholding an equal amount from the proceeds of the policy at maturity.

It must be conceded, we think, that if the policy was one the ownership of which was and remained in the insured to the time of his death, he was at liberty to use

and dispose of the same in any manner that seemed proper to him. He could pledge it as security for his individual debts, and could in various ways incumber or divest his interest therein at pleasure. He could contract with the company for a loan of money, and would have the right to assign the policy to the company to secure the loan. But even if he did not make such an assignment, we are inclined to the view that if the policy was legally his property, or the title was such that he could pledge or assign the policy, he could contract for any legitimate indebtedness to the company subsequently to the execution of the policy, and that the provision to deduct "all other indebtedness" would entitle such company to deduct such loan from the insurance, as in that case it is easily seen that the parties could be held to have contemplated just such an arrangement, and thus provided for it in the contract of insurance.

The policy contains the statement that it is written "for the benefit of the insured, if living at the maturity" thereof. The word maturity here obviously refers to the maturing of the policy during the lifetime of the insured. It provides that if the premiums are paid during the term of fifteen years, and other conditions complied with, and the insured is then living, the insurance shall be paid to Isaac Woods. If, however, the latter should die during the fifteen years, such insurance was to become payable to Mary E. Woods, his wife, if living, otherwise to the executors, administrators or assigns of the insured.

It is insisted on behalf of the appellant that the policy was one of endowment. "An endowment policy is an insurance into which enters the element of life. In one respect it is a contract payable in the event of a continuance of life; in another, in the event of death before

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the period specified." Anderson's Law Dic., p. 401. Endowment insurance provides for the payment of the sum insured to the person insured if he live to a certain time, or, if he die before that time, to some other person nominated in the policy. Bliss on Life Ins., 2 ed., p. 6, section 6.

Such a policy is in many of its characteristics, respecting the rights of the parties under it, different from an ordinary life policy procured by a husband for the sole benefit of his wife. In a policy of the kind last mentioned the wife acquires the absolute title upon its execution, and she becomes its owner the same as if it were a note or other chose in action payable to her, and hence no act of her husband or the insurance company, without her concurrence or assent, can deprive her of such title to or interest in the policy, if its conditions have been complied with; while if the policy be one of endowment, payable to the husband, if living at the end of the endowment period, or to the wife, if the insured should die during such period, and she be then living, the title to the policy does not vest absolutely in the wife upon the execution of the policy, nor, indeed, until the husband's death, during such period, and the husband retains at least a qualified interest in and title to the policy during his lifetime.

Assuming that the policy in suit is one of endowment, payable to the husband if living at its maturity, and to the wife in case of his death during the period of endowment, the question arises: In whom was the title to the policy at the time of its execution and delivery? The appellant's position is that in such a case the wife acquires no interest in the policy whatever unless or until the husband dies during the period of the endowment, and that the husband, as the insured and primary beneficiary, has the absolute control of the policy as long as he lives

and may dispose of the same as he may deem proper. On the other hand, the appellee contends that as soon as the policy was executed and delivered she acquired such an interest in the same as prevented the insured from transferring, incumbering or in any manner affecting the insurance adversely to her, and that inasmuch as the policy was not subject to transfer or incumbrance of any kind by the husband, the "indebtedness" spoken of in the policy could not have referred to a loan, as the parties can not be presumed to have contemplated a restriction of the contractual rights of the wife in the absence of an express stipulation to that effect.

The question is one of importance, and not free from difficulty. We have given it a careful consideration, and after an examination of the authorities cited by counsel, and such others as we were able to find, we have been led to conclude that the law upon this question is with the appellee. In a certain sense, it is true, she may be said to have no interest in the policy until her husband's death, for it is upon this contingency that her interest depends. But in another sense she does have an interest in the policy from the time of its delivery, although it be only a contingent interest, and one which may or may not become absolute. Of this interest, contingent though it may be, she can not be divested without her consent. Had the insured lived until after the maturity of the policy, a disposition of or incumbrance upon the policy or the insurance might have been valid as against him, but he had neither the right nor the power to divest his wife of that interest with which by his previous act the law had invested her. When the policy was executed and delivered, its title vested not in Isaac Woods alone, but in him and the appellee both. Each had only a conditional title, depending upon the contingencies provided for in the contract of insurance. The title

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of each was in the whole policy, and so remained until after the time the loan was made to Isaac Woods by the appellant, though it is also true that under the terms of the policy the interest of the appellee might, in a certain contingency, have become divested subsequently, upon the happening of the event mentioned in the policy. *Continental, etc., Life Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. R. 350.

In the case of *Fowler v. Butterly*, 78 N. Y. 68, the policy was on the life of the insured "until the 6th day of September, 1882, or until his decease, in case of his death before that time." In the latter event the proceeds of the policy were to be paid to the wife of the insured, if living, otherwise to his daughter. By the terms of the policy the insured would have been entitled to receive the money, had he lived until after its maturity, but in case of his death during the endowment period, the insurance was to go to his wife, if living.

The insured having died during the endowment period, suit was brought upon the policy. It was shown that the insured, in life, had assigned the policy, in which assignment the wife had attempted to join. The assignment by her was held void as not having been duly executed. The assignment by the husband was held not to convey the title, the wife having, upon the delivery of the policy, acquired a direct interest in the same, which could be transferred only by an assignment duly executed. These cases, we think, are in point, and they meet with our approval. The authorities relied upon by appellant's counsel do not support their position.

The case of *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, is certainly far from it. In that case the insurance was payable to the assured or his assigns, on the 8th day of December, 1897; or, if he should die before that time, to his legal representatives. It was held that

an assignment of the policy by the insured passed the title to the assignee, the insured having died in 1878. The manifest purpose of such insurance could be for the benefit of the insured only. It was a chose in action, owned by him, and which he had a right to alienate at pleasure, under proper circumstances.

The text quoted by counsel for appellant, from May on Insurance, section 390, does not support their contention; although it would seem, at first blush, to do so. That author says, in speaking of an endowment policy such as we assume the one in the present case to be: "The wife's rights do not attach till the death of the husband, within the time limited." The "rights" here spoken of, have reference, we think, to her rights in the money—the proceeds of the policy. This is true in a sense, and, in a similar sense, the husband's rights do not attach until the period of endowment has expired. Both the context and cases cited by the author convince us that the contention of the appellee's counsel as to the application of the sentence that the interest does not attach till the happening of the event provided for is the correct one. At all events, the text, as interpreted by appellant's counsel, does not commend itself to our approval, and is not supported by authority. We are of opinion that none of the authorities relied upon sustain the appellant upon this point, but if they did, we should nevertheless be inclined to follow the cases holding the opposite view, as they are, it seems to us, grounded upon sound principles and sustained by reason and judgment.

If, therefore, Isaac Woods had no power or right to dispose of the policy in suit, by assignment or pledge, it can not be held that the parties to the original contract of insurance could have contemplated a loan from the company to said Woods upon the faith and credit of the policy.

The only provision under which the right to the set-off

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is claimed, as we have seen, is the one which allows the company to deduct from the proceeds of the policy "the balance of the year's premium, if any, and all other indebtedness to the company." In giving construction to contracts containing ambiguous language, the courts will look to the situation and acts of the parties, and the end sought to be accomplished. The application for the insurance discloses that the name of the person in whose favor the insurance was to be effected was Mary E. Woods, and that she was the wife of the applicant.

The policy shows that she was a beneficiary, and that in case of Isaac Woods' death during the period of endowment she alone was entitled to the insurance. We think it manifest from these facts, that the purpose of the insurance was indemnity to the wife in case she should outlive the husband during the fifteen years.

To hold that under these circumstances the parties intended by their contract to provide for a loan to Isaac Woods would be doing violence to the evident purpose of the insurance. Unquestionably the parties must be deemed to have meant something by the insertion of the provision permitting the deduction of "all other indebtedness." One class of indebtedness that was to be deducted was clearly expressed in the contract, viz., "the balance of the year's premium." What did the parties intend should be deducted in addition to the balance of the year's premium left unpaid? It can certainly not be true that the parties contemplated any other indebtedness than that connected with the subject of insurance with reference to which they were contracting. If the term was to include all indebtedness, then the appellant might with propriety, have purchased a note or other chose in action which the insured owed some third party and set it off against the policy. The indebtedness that must naturally have

been anticipated between the insurer and insured was such as arose from the premiums upon which the insurance was based, and it is our opinion that this is the kind of indebtedness meant by the term employed in the policy. This does not necessarily mean cash premiums which had become due. But the parties had a right to arrange for the payment of the premiums by note or notes, and as the giving and acceptance of such would continue the policy in force notwithstanding the indebtedness for such premiums, it is easy to conceive how the insured might be indebted to the company for such premiums at the time of his death or the maturity of the policy. It seems to us that this construction is the more rational one, and clearly tends to carry out the evident purpose of the contract, while it fully secures the appellant in all its rights within the letter and spirit of the same. Moreover, in adopting this construction, we do no more than to give effect to the rule so universally recognized and followed by the courts of this country, that where indemnity is the object for which the insurance is effected the contract must be liberally construed to that end, and when the language of the policy is equally susceptible of two interpretations, the one giving greater indemnity and sustaining the claim will be adopted. May Ins. (3d ed.), sections 174, 175.

Our conclusion upon this question is that the court correctly sustained the demurrer to those answers which attempted to set off the unpaid balance of the judgment held by the appellant against Isaac Woods, against the appellee's claim on the policy in suit.

Other paragraphs of the answer are based upon the alleged assignment of the policy by Isaac Woods and his wife, Mary E. Woods, the appellee, to the appellant company, to secure the debt of Isaac Woods to the company.

For the reasons heretofore stated, we think the assign-

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ment of Isaac Woods was void; and as to the assignment of the appellee, she being a married woman, and the assignment being to secure a debt of her husband, it was void also. R. S. 1894, section 6964.

It is, however, contended on behalf of the appellant that under the averments of the eleventh paragraph of the answer the assignment must be held sufficient "upon the theory that the policy being an Ohio contract, and the assignment being a mere incident to the policy, both the policy and assignment are to be construed according to the laws of Ohio; and, further, that the assignment is a chattel mortgage of the insurance money, the *situs* of which is in Cincinnati, Ohio, and that the assignment is therefore to be construed by the laws of Ohio, and that by the laws of that State the assignment is valid."

It is true that the policy itself is an Ohio contract and governed by the laws of that State, but this rule has no application to the contract of assignment which, though made by indorsement on the policy, is yet a separate and distinct contract from that of the policy. An insurance policy is a chose in action, for a chose in action is an instrument upon which may be founded a right of proceeding in a court to procure the payment of money. *Vawter v. Griffin*, 40 Ind. 593 (601).

The policy being a chose in action, it may be assigned in the same manner as a note, bill of exchange or account. The assignment transfers the ownership or interest of the assignor. In the case of a note, or bill of exchange governed by the law merchant, the assignor, in addition to transferring his interest in the debt, impliedly obligates himself that the instrument is genuine, that he is the owner of the same, and that the maker will pay it when due. An assignment of a policy, like an assignment of an open account, does nothing more than to transfer the property. The assignment of a chose in

action is governed by the law of the place where the assignment is made. *Rose v. Park Bank*, 20 Ind. 94; *Rose v. President, etc.*, 15 Ind. 292.

Under the rules of the common law, the assignment or transfer of a chose in action was forbidden as in violation of the law against maintenance and champerty, and because the vendor could not sell a thing he did not then really have but which he only expected to obtain at some future time. Co. Lit., 266a.

• But this ancient rule has long since been disregarded in the courts of equity, and not only choses in action, but mere possibilities, expectancies and things *in esse* may be assigned, and such assignments will be enforced in equity, and the assignee will acquire the property by the assignment. 1 Am. and Eng. Encyc. of Law, 827.

Our statute recognizes the right of assignment of any claim or chose in action, not only in writing, but by simple delivery of the thing assigned, but unless the assignment is by indorsement in writing, the assignor must be made a party defendant in a suit by the assignee upon the claim. R. S. 1894, section 277; *Lynam v. King*, 9 Ind. 3; *Cole v. Merchants' Bank, etc.*, 60 Ind. 350; *Strong v. Downing*, 34 Ind. 300.

We do not think that in this State an assignment of a policy of insurance is governed by any rule of law different from those obtaining in cases of assignment of choses in action generally. The validity of any contract must depend upon the law of the place where it is made. If the appellant has any assignment it must be by reason of the contract by which the same was effected. That contract was made in Indiana and not in Ohio.

The case of *Lee v. Abdy*, 17 L. R., Q. B. Div., 309, is precisely analogous. In that case the suit was by the assignee of a life policy issued by an English company. The assignment was made at Cape Colony, where the as-

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signor and assignee both resided at the time. By the laws of Cape Colony the assignment was void, though valid under the law of the place where the policy was issued. It was held that the law of Cape Colony governed, as the contract of assignment was made there, and the assignment was, therefore, adjudged to be void.

To the same effect is *Prentice v. Steele*, 4 Montreal L. R. (Superior Ct.) 319, where it was expressly decided that the assignment of a life policy, which is a chose in action, is governed by the law of the place where it (the assignment) was made, and not by the law of the place where the policy was issued or the insurance is payable. And to the same effect is *Miller v. Campbell*, (N. Y. App.) 35 N. E. Rep. 651, where a Massachusetts corporation had issued an endowment policy insuring a husband's life for fifteen years, payable to the wife, if living, in case of the husband's death during the endowment period, which was assigned by the husband and wife, who resided in New York. It was held that the laws of New York governed the validity of the assignment.

We hold, therefore, that the law of Indiana controls the assignment in suit, and by that law the assignment is void.

It is next contended, as we have seen, that the assignment of the policy constitutes a chattel mortgage for the security of Isaac Wood's debt to the company, and that as the chattel which was mortgaged, *i. e.* the insurance money, was in the State of Ohio, where a married woman may become surety for her husband, the law of Ohio must govern, and the assignment, or mortgage, must be held valid. The contention is based upon the clause in the assignment which undertakes to set over the policy "and all sum or sums of money that may become due by virtue thereof," etc.

Counsel for appellant insist that "chattel mortgages

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are governed by the same rules of interpretation as to their validity, nature, and obligation as contracts relating to and affecting the title of real estate," and that the appellant not having sought this forum to enforce the contract, but having been brought here by the appellee, *in invitum*, "the appellee will not be allowed to use the courts of this State to enforce the policy against the defendant, and to repudiate her mortgage of that policy to the defendant."

If we should concede that the attempted assignment of the policy amounts to a mortgage on personal property in Ohio, and that the same law must be applied as if it were a mortgage on land in Ohio, and that the appellant is entitled to have the controversy settled by the interpretation of the courts of that jurisdiction, we apprehend the appellant would fare no better, for in a very recent case decided by the Supreme Court of that State it was held that a mortgage executed in Indiana by a married woman domiciled in this State, on real estate in Ohio, to secure an obligation as surety to be performed in Indiana, where she is without capacity to make such a contract, is void in Ohio as well as in Indiana. *Evans v. Beaver*, 33 N. E. Rep. 643.

But we need not decide what would be the proper rule if the transaction in question were a mortgage. It is not a mortgage, and the words quoted above do not stamp it with that character. In the written transfer itself, it is denominated an "assignment" four times, and what it undertakes to do is to "assign, set over and transfer" the policy. The appellee and her husband owned a chose in action, represented by the policy. This chose in action was for money to become due in Ohio. We apprehend that if a person residing in Indiana, who holds a note or claim against a citizen or corporation in Ohio, and attempts, by indorsement, to

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"assign, set over and transfer" such note or claim "and all sums of money that may become due by virtue thereof," it would hardly be claimed that this was a mortgage on the money to become due in Ohio, and that although the transfer of the note might be void so as to retain the legal title of the same in the assignor, yet that an interest in the money in Ohio would be conveyed to the assignee. We regard the position of appellant's counsel (that the attempted transfer of the policy, though void as an assignment, is still valid as a chattel mortgage) as utterly untenable. It is the policy that constitutes the chose in action attempted to be transferred, and the *situs* of the policy is the domicile of the owner, and by the laws of the place where the transfer was made or attempted to be made, the contract must be controlled. *Crouse v. Phoenix Ins. Co.*, 14 Atl. Rep. 82.

The third and last defense set up by the appellant is contained in the remaining paragraphs of the answer, and presents the question whether the company may, after failure of the insured to pay the premium, enforce its collection, and also insist upon a forfeiture of the policy, when the policy provides for a forfeiture upon failure to pay such premiums when due and that the default in payment shall entitle the company to treat the premium as earned.

It is disclosed by the pleadings, and conceded in argument by appellant's counsel, that the premium note, for the nonpayment of which the forfeiture is claimed, was afterwards merged into a judgment taken by the company against Isaac Woods, in which other notes due the company for a loan were also involved, and that more than enough of the judgment to cover the note in question was subsequently made out of the said Isaac Woods' property which had been mortgaged to secure the same and said other notes, although it is averred in some of

the paragraphs, that the money collected was applied by the company to the payment of the loan.

The parties doubtless had a right, by the insurance contract, to provide for a forfeiture of the policy by reason of failure to pay the premiums or any of them. The appellant had the right to insist upon this condition in the policy, and to claim a forfeiture upon failure of the insured to comply with the same. But it is also the settled law that the right to insist upon a forfeiture may be waived by the insurer, and that such waiver may be manifested through the conduct, as well as through the words, of the insurer. *Phoenix Ins. Co., etc., v. Tomlinson*, 125 Ind. 84.

Forfeitures are not favored, and the law will be strictly construed to defeat them, although they will be upheld if the conditions underlying them are strictly complied with by the insurance company.

In the present case, the company had received the premium,—had enforced its collection by suit, when the insured died, for it is not insisted that the appellant had the right to apply the money realized on the foreclosure proceedings to the extinguishment of the \$2,300 loan, which was not yet due, in preference to the premium debt, then past due. The failure to declare a forfeiture was not a waiver, as the policy provides that upon failure of the insured to comply with any condition in the policy, the same was to become null and void, without any action on the part of the company, or notice to the insured or beneficiary. But we are of opinion that the enforced collection of the premium after forfeiture, or what would have been a forfeiture, constituted a waiver, and this is true, we think, notwithstanding any provision in the policy that the premium thus collected should be considered as having been earned. *Michigan Mut. Life Ins. Co. v. Custer*, 128 Ind. 25; *Phoenix Ins.*

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Co. v. Tomlinson, supra; Mutual Life Ins. Co. v. French,
30 Ohio St. 240.

From what we have said, it must be apparent that our views of the law coincide throughout with those of the court below, and that, in our judgment, no error was committed in sustaining the demurrer to the several paragraphs of the answer.

Judgment affirmed.

Filed April 20, 1894.

ON PETITION FOR A REHEARING.

REINHARD, J.—In their brief upon the petition for a rehearing, counsel for appellant say:

“The answers of appellant to the appellee’s complaint show:—

“1. The issuing of the policy in suit, a partial payment of the premium necessary to carry it in force and the execution of notes payable in installments for the balance of the year’s premium.

“2. That the policy in suit lapsed for the nonpayment of premiums, the decedent failing to pay the notes given for the deferred payments of the first year’s premium.

“3. That after the policy in suit had been forfeited, the appellee and her husband procured a loan of \$2,300, the appellant believing, as it had the right to believe, that if Isaac Woods lived he would keep up his insurance and pay his debts, and if he died that the insurance money would pay the debt, the appellant having the right to deduct the indebtedness from the policy out of this loan of \$2,300; the answers show the premiums in arrears on the policy in suit were paid and the forfeiture waived and new life put in the policy.

“This is a fair statement of the issues raised upon the question of the construction of the policy, ‘all other in-

debtedness being first deducted,' etc. The provision last above quoted is not meaningless; it is not ambiguous, and we think clearly means that the indebtedness owing, growing out of or connected with the policy in suit, is to be first deducted before the appellee has any right of recovery."

Granting that the above is a fair statement of what was involved in the transaction between the parties in connection with the contract of insurance, the conclusion that the contract authorized a deduction of the amount of the loan does not follow. It is true that some insurance companies loan money, but it does not, therefore, follow that when any insurance company issues a policy in which it is provided that out of the proceeds of the policy all other indebtedness, except that specifically mentioned, shall be deducted, that the parties contemplated a loan by the insurance company to the insured, and that this was one of the items to be deducted. The parties must be held to have contemplated only what was fairly within the scope of their present negotiations. Could it be justly maintained that if the company had, subsequently to the issuing of the policy, sold the insured a farm or a house and lot that such an item of indebtedness was contemplated by the parties? Possibly such an item might be properly deducted if the transaction were confined to the original contracting parties—the company and the insured. But when a third party, who has a right or interest in the policy, which vested before the indebtedness accrued, comes in and asserts a claim to the insurance money, can it be held that she took the policy subject to a burden that was not fairly within the contemplation of the parties to the contract when it was made? We think not.

But it is urged that the policy had been forfeited, that new life was given it only by virtue of the loan, and that

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if this had not been made, the appellee would not have had any policy at all. This may be conceded. And yet the making of the loan did not create a new contract of insurance between the parties. It only revived what rights either party or all parties had after the original contract had been entered into. The loan did not impress the original contract with any new features whatever, any more than if the policy had been revived without the making of the loan, but by the simple payment and acceptance of the premium. It will not do to say that the effect of our ruling will be to "destroy the rights of many people and lay down a dangerous principle of law," as counsel urge in their brief. It is an easy matter for an insurance company, when it issues a policy, to insert a provision that any money loaned the insured shall be deducted from the proceeds of the policy. If the contract is between the company and the insured alone, the former can also secure itself in any loan it may make in future by an assignment of the policy. It is always a safe rule to hold the parties to their contract, interpreted in the light of the surrounding circumstances and the position of the parties. The danger lies in courts suffering themselves, out of mere consideration that a hardship might be entailed upon a party in a particular case, to give constructions to contracts unwarranted by the terms thereof, and not within the scope of the manifest intention of the parties. It is useless to attempt to invoke the legal principle here that where a married woman receives a benefit from her contract she can not accept such benefit and reject the burden of the contract, or disavow it entirely. The appellee did not procure any loan from the appellant. The fact that she signed the notes given for the loan does not prove that she obtained the money, nor indeed does it make her liable thereon, if, as in the present case, she

was only surety for her husband. All the transactions connected with the loan occurred after the making of the original contract of insurance, and her vested interest in the same could not be defeated by the fact that her husband subsequently obtained a loan from the company for which he attempted to pledge the policy.

It is now insisted that we were in error in assuming that the money realized from the sale of the real estate was applied to the extinguishment of the premium notes then due from the insured in preference to the payment of the loan; and counsel state that there is nothing in the pleadings to warrant such a conclusion. Counsel for appellant, in their original briefs, discussed the alleged errors of the rulings of the court upon the several paragraphs of the answer together, and did not direct our attention to the sufficiency of the several paragraphs in detail. In one of the answers the pleader sets forth the substance of the judgment and decree of foreclosure of the mortgages of the real estate. It appears from this judgment and decree that the court found that certain sums of money, to secure which the mortgages were executed, were then due, and others would subsequently become due; that the amount then due was \$352.51, upon certain notes not specified, together with \$178.62 attorney's fees; that there were to become due thereafter on certain notes the following sums, to wit:

October 30, 1889.....	\$ 161.04
October 30, 1890.....	161.04
January 1, 1890.....	184.00
January 1, 1891.....	184.00
January 1, 1892.....	184.00
March 31, 1892.....	2,346.00

It was then decreed that the land be sold to satisfy the mortgages; that the proceeds be applied, first, to the payment of the costs accrued and accruing; then to the

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amount due, to wit, the \$352.51 and the attorney's fee of \$178.62, making in all \$531.13, and the interest thereon, and lastly to the amount not yet due. Of course, we can only presume that these payments were applied according to the decree of the court, whether such decree was correctly or incorrectly made.

It is further shown in this paragraph of the answer, that the property sold for \$587.28, and that after payment of costs the sheriff paid the appellant \$534.66, which must have been applied, first, to the payment of said \$531.13 then due, according to the order of the court in the foreclosure proceedings, and which amount represented what was due on the premium notes. With this payment, as we held in our former opinion, the policy was revived, and if the policy remained in force after the payment of the third premium note (which was included in the payment of the \$531.13), it continued to remain in force until the death of the insured as a paid-up term policy under the stipulations of the contract of insurance. It is now contended that the amount of forborne premiums remaining unpaid at the time of the death of the insured, should have been deducted from the face of the policy. It is true the policy provides for such deduction, but there is no answer raising this question, nor was there any motion to so modify the judgment as to make it conform to the contract in this respect. The question can not now be presented for the first time.

Appellant's learned counsel further contend, however, that the assignment of the policy by the wife was not an act of suretyship, but that "her signature merely had the effect of making her a party to an agreement that if the insurance company would loan her husband \$2,300, he would take out insurance upon his life to secure the loan, and make her a gift of whatever money might be

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payable under the contract of insurance after the lien had been discharged."

We do not so construe the contract for the loan. The reviver of the insurance policy was not a new contract of insurance. If the appellee's husband had borrowed the \$2,300 from a third person and had applied a portion of it to the payment of premiums so as to revive the policy, and the appellee had attempted to assign the policy to the person who loaned her husband the money, as a security for the loan, no one would certainly contend that the assignment was not an act of suretyship by the wife in behalf of her husband. There is no difference in principle. The fact that the wife in some way receives a benefit from the transaction will not render her liable, if she is in reality a surety. A husband may borrow money and give his wife as surety, but her act in becoming surety will not bind her, even though it is shown that the husband subsequently made her a present of the money.

Here it is not contended that the wife was liable for any portion of the debt which her husband owed the appellant for insurance, nor that the money was borrowed for the benefit of her own estate. Had the husband lived till after the expiration of the fifteen years for which the policy was written, he would have received the whole amount of the insurance. The cases relied upon by appellant's counsel do not support their contention. *Vogel v. Leichner*, 102 Ind. 55; *Orr v. White*, 106 Ind. 341; *Thacker v. Thacker*, 125 Ind. 489.

Petition overruled.

Filed Dec. 12, 1894.

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DISSENTING OPINION.

DAVIS, C. J.—I am not able to agree with the majority of the court in this case. Under the terms of the policy, and on account of the failure to pay the first year's annual premium, the policy became forfeited. The loan was thereupon made, by the terms of which a part of the money borrowed was applied to the payment of the annual premiums due and to become due, and in consideration of which the forfeiture of the policy was waived by the company. The policy expressly provides for the payment of the amount therein named, "the balance of the year's premium, if any, and all other indebtedness to the company being first deducted."

The rights of Mr. Woods are subject to all the terms and conditions of the contract. It is the reasonable and fair presumption that the loan was made with reference to the provision above quoted. Justice and equity, under the circumstances disclosed in the answer, would seem to dictate that the balance only should be paid to her after deducting the indebtedness. If the loan was not made in good faith, in the due, ordinary and regular course of business, a different question would be presented. It is a matter of common knowledge, of which courts will take judicial notice, that insurance companies make a business of loaning money.

The words, "all other indebtedness," referred to something other than unpaid premiums, in my opinion. In the line of legitimate business, I do not know what indebtedness could have been in contemplation of the parties aside from premiums and loans. The company certainly had the right to provide for the deduction of any unpaid premiums from the amount of the insurance, and I fail to see why such contract should not be made for the deduction of any loan which might thereafter be

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made to the insured by the company, in the usual and ordinary course of business.

The hasty observations I have made are intended to apply only to the contract in question in the light of the facts and circumstances of this particular case.

Filed April 20, 1894.

No. 1,434.

ZAPF v. THE STATE.

CRIMINAL LAW.—Intoxicating Liquor.—Sale on Sunday.—Prima Facie Case.—Judicial Notice.—Courts take judicial notice that liquor is sold in saloons to be drunk as a beverage, and when such a sale is proved as having been made on Sunday and in the ordinary manner, nothing being said at the time as to what the liquor is to be used for, it establishes a *prima facie* case against the defendant.

SAME.—Intoxicating Liquor.—Sale on Sunday.—Purpose of.—Question for Trial Court.—Evidence.—Whether there is sufficient countervailing evidence to raise a reasonable doubt as to the purpose for which the liquor was sold, is a question for the trial court or jury.

From the Marion Circuit Court.

W. W. Herod and W. P. Herod, for appellant.

W. A. Ketcham, Attorney-General and M. Moores, for State.

REINHARD, J.—This is an appeal from a judgment of conviction for the sale of intoxicating liquor on Sunday. There was a motion for a new trial, which was overruled and an exception taken. The appellant's only contention is that the evidence does not support the finding. It is insisted that the evidence shows that the liquor was sold and drunk for medicinal purposes. We have examined the evidence, and find that it is sufficient to sustain a conviction. The appellant testified that he

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sold the liquor for medicinal purposes. He also introduced other witnesses to corroborate him upon this point. The person to whom the liquor was sold testified that he called for a drink of whisky in appellant's saloon, on a Sunday in December last; that the appellant set it out to him, and that he paid him for it. He stated that he said nothing to Zapf, at the time, as to the purpose for which he wanted the liquor, but that he had told him previously, when he purchased whisky of him, that he was taking it for weak lungs. He also testified that he had had an attack of the grip, but that this had been long before that time, and that he did not know whether he had entirely recovered from it or not. He stated that he was not sick at the time, but was not feeling as well as he had felt. It did not appear that appellant made any inquiry of the witness at the time of the sale concerning the purpose for which he wanted the liquor. It also appears that others were in the saloon and restaurant of the appellant, drinking liquor at the time of the occurrence of this transaction, and that appellant sold liquor to such persons without inquiring whether they wanted it for a beverage or for medicinal purposes.

It is conceded by appellant's counsel that proof of the sale of the liquor made a *prima facie* case against the appellant, and that if the appellant would avoid a conviction on the ground that it was sold for any other purpose than to be drunk as a beverage, this was a matter in defense of the prosecution. Doubtless this is the law. Courts must take judicial notice that whisky is sold in saloons to be drunk as a beverage, and when such a sale is proved as having been made on Sunday, and in the ordinary mode, nothing being at the time said as to what the liquor is to be used for, it establishes a *prima facie* case against the defendant under the statute. Whether there is sufficient countervailing evidence to

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raise a reasonable doubt as to the purpose for which the liquor was sold is a question for the trial court or jury. *Morel v. State*, 89 Ind. 275; Gillett Crim. Law, section 1017.

We can not say, in the present case, that the uncontradicted evidence shows that the liquor was sold for medicinal purposes.

Judgment affirmed.

Filed Dec. 13, 1894.

No. 1,538.

POST v. CECIL.

CONTINUANCE.—In Discretion of Court.—Abuse of Discretion.—Reversible Error.—An application for a continuance of a cause of action is addressed to the sound discretion of the court, and the decision of the court in such matter will be revised only where it has plainly abused its discretion. That the court abused its discretion in refusing continuance, on account of absence of defendant, see opinion.

LOTZ, J., and REINHARD, J., dissent.

From the Boone Circuit Court.

R. W. Harrison, for appellant.

W. N. Harding and *A. R. Hovey*, for appellee.

DAVIS, J.—This was an action for slander. The cause has been tried by a jury three times. After the return of the first verdict appellant was granted a new trial. On return of the second verdict application was made by appellee for a new trial, which was sustained. The last trial resulted in a verdict for appellee for four thousand dollars. Appellee entered a remittitur for two thousand five hundred dollars, and thereupon judgment was rendered against appellant for fifteen hundred dollars.

One of the errors assigned by appellant brings in review the action of the trial court in overruling his motion for a continuance. Just before entering upon the trial Robert W. Harrison, attorney for appellant, filed an affidavit and motion in behalf of appellant for a continuance of the case. It appears from this affidavit that appellant and his attorney had made due and diligent preparation for the trial of said cause on that day; that appellant "has a good and meritorious defense to the action herein, or at least that plaintiff's recovery should be reduced to a mere nominal sum, if defendant were present in court;" that appellant was then suffering from a sudden and unexpected attack of lagrippe and neuralgia as the result of having been caught in a recent rain, on account of which he was unable on said day to leave his home at Indianapolis to attend said trial at Lebanon; "that the defendant is a witness in his own behalf in said cause and will testify, as affiant believes, as he has heretofore, that the matters and things alleged in the plaintiff's complaint are untrue;" "that he can not safely go into the trial of the above entitled cause at this time on account of the absence of his client;" "that it would be impossible to go to trial in said cause without the aid and assistance of his said client." The illness of appellant and his inability to attend court were supported by appellant's affidavit and the certificate of his attending physician. It further appears in the affidavit for continuance, "that he believes the testimony and presence of his client can be procured if said cause is continued until the next term of court;" "that this affidavit is not made for delay merely, but for the furtherance of justice."

This application was addressed to the sound discretion of the trial court. It is true the statements in reference to his testimony and the necessity for his presence at the

trial to aid and assist his counsel are not so full and specific as they might be, but the affidavit certainly shows a reasonable excuse for the absence of the appellant when the motion for continuance was made. It also shows in general terms that he was an important witness and that his aid and assistance were necessary during the trial. The affidavit discloses that appellant was the sole and only defendant in the action and that his presence at the trial was important, not only as a witness, but also as a party to aid and assist his counsel. There is nothing in the record indicating that the facts stated in the affidavit were not true or that the application was not made in good faith. The action was for slander. The slanderous words alleged to have been spoken grew out of a quarrel on account of a small item of indebtedness between the parties. The circumstances were such that it was desirable that both parties should be seen and heard by the jury if practicable. An examination of the affidavit in connection with the entire record convinces us that in the exercise of a proper judicial discretion the court below ought to have continued the cause, and that it erred in refusing to do so.

An appellate court is reluctant to revise the decision of the trial court in cases like this which rest in their discretion, but under the circumstances disclosed by the record in this particular case we are of the opinion that such revision is both necessary and proper in order that justice may be fairly and impartially administered between the parties. We express no opinion as to the merits of the controversy. There may, however, be mitigation without justification, and both parties should have a reasonable opportunity to present their respective theories of the transaction fairly to an impartial jury. *Welcome v. Boswell*, 54 Ind. 297.

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Judgment reversed, with instructions to grant appellant's motion for a new trial.

Filed Dec. 19, 1894.

DISSENTING OPINION.

LOTZ, J.—I do not concur in the opinion of the majority. A motion for a continuance is addressed to the sound discretion of the trial court, and a judgment should not be reversed on account of a ruling thereon unless it very clearly appears that this discretion has been abused or erroneously exercised. *Moulder v. Kempff*, 115 Ind. 459.

The presumptions are in favor of the action of the court in reference to such ruling, and no reversal should be ordered unless it be affirmatively shown that the ruling was wrong. *Pate, Exr., v. Tait*, 72 Ind. 450.

It is true that it is an important privilege for a party to the action to be present at the time of the trial. His counsel often stands in need of his aid and advice. This privilege ought not be denied except for weighty reasons. He stands in a different attitude from that of an ordinary witness. *Welcome v. Boswell*, 54 Ind. 297:

His absence may be, but is not necessarily, a cause for a continuance. When a continuance is sought on account of the absence of a party, the necessity for his presence should be clearly made to appear. If his counsel is not familiar with the cause or with the evidence, nor acquainted with the witnesses, such facts should be shown.

It has been expressly decided by the Supreme Court that an affidavit for a continuance on account of the inability of a party to be present at the trial, must show that it was necessary that he should be personally present at the trial in order that he might advise and confer

with his counsel during the progress of the trial. *Fisse v. Katzentine*, 93 Ind. 490 (494).

The statement contained in the affidavit in this case, "that it would be impossible to go to trial * * * without the aid and assistance of his client," is but a conclusion, and not the statement of a fact. Nor are any facts stated from which such conclusion can be drawn. It is readily conceivable how a cause may proceed to trial without the presence of a party, and such trials often occur in actual practice. His presence is not a necessity as a matter of course. It is true that the nature and character of the action may have something to do with the necessity of a party's presence. But if we may look into the whole record, the words alleged to have been spoken, if spoken at all, were uttered in a public place in the presence of a large number of witnesses, some of whom knew as much about the case as the appellant himself, and who were present at the trial and from whom the counsel could have obtained the necessary information and aid. I am of the opinion that the affidavit fails to show a necessity for the presence of the appellant at the trial; nor was the affidavit sufficient on account of the absence of the appellant as a witness. For aught that appears the same evidence could have been obtained from other witnesses.

REINHARD, J., concurs in the dissenting opinion of LOTZ, J.

Filed Dec. 19, 1894.

The South Bend Iron Works v. Larger.

No. 1,188.

THE SOUTH BEND IRON WORKS v. LARGER.

NEGLIGENCE.—*Open Elevator Shaft.*—*Licensee.*—A person entering a warehouse as a licensee merely and falling down an unprotected elevator shaft, to his injury, has no cause of action against the owner of such warehouse.

SAME.—*Invitation by Owner of Premises.*—It is only when the injured party comes upon the premises of the owner or proprietor by invitation, express or implied, that the latter assumes the obligation of providing safe and suitable means of ingress and egress, and of moving about the premises.

APPELLATE COURT PRACTICE.—*Attacking Complaint in Appellate Court.*—The statute allowing a complaint to be attacked for the first time in the Appellate Court should receive a liberal construction; and if the defect in the complaint is such as may be remedied by the application of liberal and reasonable intendments, it will be held sufficient to withstand the attack.

SAME.—*Absence of Averment.*—If there be an entire absence of averment of a substantial cause of action, or there be wanting some fact essential to the cause of action, and which may not be supplied by applying to the pleading the rules of intendment, then the judgment can not be upheld, even though the complaint be assailed for the first time in the Appellate Court.

From the Marion Superior Court.

A. C. Harris and L. A. Cox, for appellant.

F. H. Blackledge and W. W. Thornton, for appellee.

REINHARD, J.—The appellee sued the appellant and recovered damages for a personal injury alleged to have been sustained by him in falling through an elevator shaft or hatchway, in the appellant's warehouse, in the city of Indianapolis. There are but two specifications of error, viz.:

1. The amended complaint, and each paragraph thereof, fails to state facts sufficient to constitute a cause of action.

2. The court, at special term, erred in overruling the appellant's motion for a new trial.

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The complaint is in two paragraphs.

The first paragraph counts upon the negligence of the appellant in leaving the hatchway without guards or other protection.

The second is the same as the first, differing only in the respect that it characterizes the acts of locating, constructing and maintaining the elevator and hatchway, and in not providing suitable guards and other protection about the same as being the result "of the willful carelessness and negligence" of the appellant.

It is not contended on the part of appellee's counsel that the second paragraph of the complaint is sufficient as declaring upon a willful injury inflicted upon the appellee by the appellant, and it is proper to state here that no such case is presented by the evidence, and the court so instructed the jury. The controlling question, therefore, in connection with this assignment, is whether the two paragraphs of the complaint, when considered together, contain sufficient averments to make a case of ordinary negligence against the appellant so as to withstand the assignment that the complaint does not state facts sufficient to constitute a cause of action.

The objection urged to the sufficiency of the complaint is that it wholly fails to show that the appellant owed the appellee any duty, by reason of which it was bound to protect him against the danger of falling into the open hatchway.

It is averred in each paragraph of the complaint that, at and before the time of the alleged accident, the appellant owned and operated, in the city of Indianapolis, a warehouse for storing goods and merchandise; that at said time "The Mullen-Blackledge Company," a corporation doing business in said city, leased and occupied space on the third floor of said warehouse for the storage of goods, and, for the purposes of their business, in con-

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nection with said storage of goods, had a right of way on and across the first floor of said warehouse for the purpose of overseeing and controlling the loading and shipment of cars on the railroad tracks running into the said warehouse, and for all other purposes connected with the shipment of goods; "that at about dusk, on the afternoon of said day, the plaintiff herein, at the request of his employer, went to and into the said warehouse for the purpose of arranging and fastening certain signs upon the cars being there loaded and about to be shipped, and for the purpose of seeing that said cars were properly loaded; that in order to comply with his instructions, he was compelled to walk and did walk on and across the first floor of said warehouse toward the open door of a car standing upon said warehouse railroad track; that at or near the middle of said first floor, in the direct line of approach to said car, and between the plaintiff and said car, there was a hatchway for an elevator used in said warehouse; that said hatchway was not enclosed or in any manner protected, nor was there on or about the same any sign, guards, warning, signal, or any means of any kind whatever to indicate the presence of a dangerous pitfall; that said plaintiff had never been in or about said warehouse prior thereto, and was entirely ignorant of its plan of construction; and while in the act of walking across the first floor of said warehouse, being in the discharge of his duty and where he had a right to be, he stepped and fell down and into said open and unprotected hatchway; that said defendant, through its agent, knew that the plaintiff was to enter and to walk on and over the first floor of said warehouse to said car, which was then and there being loaded with the goods of said Mullen-Blackledge Company; that the fall and injury

therefrom was without any negligence whatever upon the part of the plaintiff herein, but because of the carelessness and negligence of the said defendant in locating, constructing and maintaining said elevator and hatchway in the warehouse in an unnecessary and dangerous place, and further, in not providing and maintaining warnings, lights and guards or any means of protection or notice of peril, on or about the elevator or hatchway." The remainder of the complaint has reference to the injury and damages sustained by the appellee.

Actionable negligence consists in the failure of the defendant to discharge some duty or obligation resting upon the defendant toward the plaintiff from which injury has resulted. The owner or occupant of a warehouse used for the purposes of storage has a right to construct and maintain an elevator to hoist and lower the goods stored, and for the use of the employes in and about the building. And before one injured by falling through the shaft of such elevator, which was left unprotected through the owner's negligence, may recover damages of such owner for the injury, it must appear that such owner was under some legal duty or obligation to the person injured to protect him against the dangers of such an opening. *Howe v. Ohmart*, 7 Ind. App. 32, and cases cited.

If, for example, the appellee was a mere trespasser upon the appellant's property, the latter owed him no such duty as would require him to provide safeguards around the open elevator shaft.

If he was a licensee, that is, if he was permitted to come upon the premises by the mere sufferance of the proprietor, the latter still owed him no duty which would render him liable for leaving the opening unprotected. It is only where the injured party comes upon the premises of the owner or proprietor by invitation, express or

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implied, that the latter assumes the obligation of providing safe and suitable means of ingress and egress and of moving about the premises. *Evansville, etc., R. Co. v. Griffin*, 100 Ind. 221; *Thiele v. McManus*, 3 Ind. App. 132.

The complaint in the case before us does not show what relation the appellant sustained to the appellee in the particular mentioned. It is averred in the complaint that the appellee went into the warehouse to post some signs upon the cars that were being loaded, and to see that they were properly loaded, as it was his duty to do. It is also stated that he went at the request of his employer, but who the employer was, whether the appellant or the Mullen-Blackledge Company or an entire stranger, is not made to appear directly or indirectly. That the complaint fails to show that the appellant owed the appellee such a legal duty as required it to protect the elevator opening by proper safeguards, we think is obvious, and if a demurrer had been filed and overruled such ruling would doubtless have been error. Indeed, this is practically conceded by appellee's counsel, but their contention is that the defect is cured by the verdict.

It is one of the salutary provisions of the code that if no objection is taken to a complaint, either by demurrer or answer, the same shall be deemed to have been waived, except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action. R. S. 1894, section 346 (R. S. 1881, section 343). It would seem that, upon principle, this statute should receive a liberal construction, and such construction it has indeed received at the hands of the courts. If the complaint is merely defective in the statement of the cause of action, and the defect is such as may be remedied by the appli-

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cation of liberal and reasonable intendments, it will be held sufficient to withstand an attack made for the first time after verdict or in the appellate tribunal. The reasons for the liberal construction are obvious. A party who stands by in the trial court and permits the action against him to proceed until after the trial, without raising any objections to the complaint, which is the foundation of such action, and without giving his adversary an opportunity to correct the imperfect pleading, is certainly entitled to little or no favor in a ruling upon the sufficiency of such pleading after verdict; and if such party suffers the complaint to go unchallenged through the trial court, the appellate tribunal will be safe in refusing to grant him the relief he might have obtained by timely objection. Every objection, therefore, of a mere technical character, will be treated as waived, and when the defect is one that can be aided by intendments, it will be held cured by the verdict.

As a general rule, the complaint will be held sufficient after verdict if it contain sufficient averments to apprise the defendant of the nature of the demand or claim against him, and to bar another action for the same thing or demand.

Where, however, there is an entire absence of the averment of a substantial cause of action, or there is wanting some fact or facts essential to the cause of action, and which may not be supplied by applying to the pleading the rules of intendment, then the judgment can not be upheld, even though the complaint was assailed for the first time in this court, for there can be no valid judgment on a complaint which states no cause of action. *Elliott's App. Proced.*, sections 471-474; *Eberhart v. Reister*, 96 Ind. 478; *Harris v. State, ex rel.*, 123 Ind. 272; *Burkhart v. Gladdish*, 123 Ind. 337; *Bronnenburg v. Rinker*, 2 Ind. App. 391; *Duffy v. Carman*, 3 Ind. App.

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207; *Cincinnati, etc., R. W. Co. v. Stanley*, 4 Ind. App. 364.

In the case last cited, the action was for negligence, and was commenced before a justice of the peace. The complaint failed to aver that the plaintiff was free from contributory negligence or that the injury occurred without fault on his part. There was an assignment of error by which the sufficiency of the complaint was called in question in this court, and a further assignment that the court erred in overruling the motion in arrest. We there held the complaint fatally defective, saying: "But where there is a failure to plead some independent fact which is essential to a recovery, or to the statement of a substantial cause of action, the omission is fatal, even on a motion in arrest. The principle has been applied by our Supreme Court more especially to complaints in actions for negligence."

In *Eberhart v. Reister, supra*, the Supreme Court ruled that a complaint in an action to recover for an injury inflicted by a vicious animal was bad on motion in arrest of judgment if it failed to show that the plaintiff was free from fault.

In *Baltimore, etc., R. W. Co. v. Anderson*, 58 Ind. 413, the action was for killing stock, and had been commenced before a justice of the peace. The complaint averred that the cattle described were killed and injured by the defendant's locomotives and cars at different times stated in the complaint, and in the county of Lake, State of Indiana, to the plaintiff's damage. A motion in arrest having been overruled, the complaint was, on appeal to the Supreme Court, held fatally defective for failing to show that the killing and injuring of the cattle was done through the negligent act or acts of the railroad company.

These citations are sufficient to support the proposi-

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tion that the complaint can not be aided by intendment when there is an entire absence of the statement of some fact or facts from which a liability could at least be inferred. Applying the rule to the case in hand, had the appellee alleged that his employer was the Mullen-Blackledge Company, or the appellant, or did the complaint contain any statement from which such fact could be legitimately inferred, the complaint would have been sufficient to withstand the attack now made upon it, as in the latter event the rules of intendment could be made applicable.

There is nothing in the complaint before us, however, from which such an inference could be legitimately drawn; nor is there anything to show that the appellant, by reason of any relation it sustained to the appellee, was in duty bound to furnish him safe conduct through the premises, such as he insists it was obligated to furnish him.

In our opinion, the complaint utterly fails to state a cause of action.

Judgment reversed.

GAVIN, J., was absent.

Filed Dec. 18, 1894.

No. 988.

DUGGER ET AL. v. HICKS.

MUNICIPAL CORPORATION.—Town.—Enforcement of Street Assessment, Complaint.—In an action to enforce an assessment for improvement of a street of a town, it is not necessary to aver that the town had not paid the assessment, if it is averred generally that such assessment was due and unpaid.

SAME.—Ordinance as an Exhibit.—The ordinance or resolution authorizing the improvement of a street is not a proper exhibit to a complaint to enforce a street improvement assessment.

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SAME.—Complaint, Details of Ordinance.—It is not necessary to set out the details of the ordinance ordering a street improvement in a complaint to enforce the lien of an assessment for such improvement.

SAME.—Complaint.—Sufficiency, Contract or Exhibit.—Price of Work.—The assessment, in an action to enforce a lien for a street improvement, is the foundation of the action, and the complaint is not bad for a failure to aver the width of the road or the depth of the grade. Nor is it necessary to set out a copy of the contract of improvement, nor to allege its specific terms, nor to allege in minute detail what work had been done under the contract, nor to state the price that was to be paid for the entire work, nor to contain a copy or refer to the ordinance, resolution, or contract.

SAME.—Contractor Widening Street.—The mere fact that the contractor, on his own motion or pursuant to the direction of the town, in making a street improvement, widens such street beyond its original limits, does not invalidate the entire proceedings, and does not constitute a complete bar to an action to recover the benefits assessed against the adjacent owners for the improvement of the street.

SAME.—Notice, Omission in Finding of Court, Concerning.—A finding by the court that notice of the resolution to improve a street is not insufficient by reason of a failure to state the exact date of the insertion in a newspaper or the length of the publication.

SAME.—Sufficiency of Resolution of Improvement.—For the sufficiency of a resolution of improvement of the roadway and the sidewalks and gutters, see opinion.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins, W. L. Cavins and I. H. Fowler, for appellants.

W. W. Moffett and C. E. Davis, for appellee.

DAVIS, C. J.—This action was instituted by appellee against appellants to enforce street assessments for the improvement of a street in the town of Bloomfield.

The improvement was made under the provisions of the act of 1889, known as the Barrett law, and amendments thereto.

In this connection it is proper to observe that an appellate court may search the record for reasons to sustain the judgment of the trial court, but is not required to,

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and ordinarily will not, reverse such judgment on a question not presented by the complaining party.

Only such errors, therefore, as have been discussed will be considered in deciding this case.

The proceedings were instituted in March, 1892. The errors assigned in this court in behalf of the several appellants, are:

1. That the court erred in overruling the demurrer to the complaint.

2. That the court erred in sustaining demurrers to certain special answers.

3. That the court erred in its conclusions of law on the special finding of facts.

The first error discussed brings in question the sufficiency of the complaint.

The first objection is that the complaint does not show that appellee has not been paid for the work performed by him, under his contract in making the improvement, by the town. The averment, in connection with the other facts pleaded, that the assessments were due and unpaid, was sufficient on this point without any allegation that the town had not paid appellee. It was not incumbent on the town to collect the assessments. In making the improvement and entering into the contract with appellee therefor, the town was acting for and in behalf of the property owners affected thereby. *Sims v. Hines*, 121 Ind. 534.

And when the appellee complied with the terms of the contract, and completed the improvement, he had the right to enforce the assessment against appellants.

The next objection urged is that the complaint is defective for failure to specifically state the nature and extent of the improvement.

The statute provides that the "board of trustees shall declare by resolution the necessity therefor, and shall

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state the kind, size, location, and designate the terminal points" of such improvement. Section 4289, R. S. 1894.

The ordinance, a copy of which is filed with the complaint, is not the foundation of the action, and can not be considered to supply any defect or omission in the complaint; but it is alleged in the complaint that "the board of trustees of said town, in regular and lawful session, duly passed, adopted and promulgated, and caused to be recorded and published, an ordinance and resolution providing for the grading and graveling of the public street and sidewalks, and the construction of a sewer or gutter for the purpose of drainage of, on and along all that part of Washington street aforesaid, commencing where it crosses Main street and running north to where said street intersects Franklin street in said town, said resolution and ordinance providing for and designating the nature and extent of said improvement and the grade to be followed and the kind of material to be used, and declaring said improvement to be necessary," etc.

The complaint is not, perhaps, in this respect so full and clear as the rules of good pleading require, but it shows compliance with all of the material statutory requirements, and it is, in our opinion, sufficient to withstand the demurrer. If greater particularity was desired, a motion to make more specific would have been the appropriate remedy. The demurrers admit that the terminal points were designated; that the location was fixed and that the character and extent of the improvement were prescribed in the ordinance. This is all the statute requires in this respect. It was not necessary to set out the details of the ordinance for the improvement in the complaint: If A enters into a contract in writing with B to build a house for him according to certain plans and specifications for a stipulated amount, A on the completion of the work, may maintain an action on

the contract without alleging in detail the size or kind of house built by him. In this case the assessments are the foundation of the action, and while it was essential that the resolution or ordinance for the improvement should contain the substantial provisions prescribed by statute, the complaint in this action is not bad for failure to aver the "width of road or depth of grade."

The last objection is that "the complaint does not set out a copy of the contract, nor show the terms of the contract, nor what work was to be done under the contract, nor the price to be paid for the work."

It was not necessary to set out in the complaint a copy of the contract, nor allege the specific terms of the contract. The appellee was not required to allege in minute detail what work had been done under the contract nor to state the price that was to be paid for the entire work. The appellee was not bound to incorporate in his complaint, by reference or otherwise, either the resolution, ordinance or contract, and when he pleaded the acts done by the municipal officers, together with the facts showing the authority to perform such acts, and alleged that in pursuance thereof after the publication of notice for ten days of the passage of said resolution for two weeks in a newspaper of general circulation, as provided in section 4289, *supra*, and after subsequently thereto advertising for three weeks in a newspaper of general circulation to receive proposals for said work, as provided in section 4288, R. S. 1894, the appellee was the lowest bidder therefor and "was awarded the contract and gave a good and sufficient bond for the construction of said improvement," and that he "thereupon made, constructed and completed said improvement in all things in accordance with the terms of said contract and the plans and specifications therein agreed upon," and also specially averred the facts, showing a full compliance with the

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provisions of sections 4293 and 4299, R. S. 1894, and set out the final estimate and assessment, which, as appears, were levied and issued pursuant to section 4297, R. S. 1894, the complaint was, so far as any objection thereto, made sufficient. *Van Sickle v. Belknap*, 129 Ind. 558.

The special answers of the several appellants, to which demurrers were sustained, are substantially the same. The facts so pleaded in bar are that the street in front of their respective properties was a public highway not exceeding forty feet in width; that a distance of fifteen feet back from the line of the street a fence was erected; that said fifteen feet was a private walk which had become so badly washed that persons could not walk over the same; that said contract for the improvement of the street covered said strip aforesaid, which was not a part of the highway; that after the contract was entered into, the slope of the grade was changed; that at the time of the commencement of the work, and at divers times during the progress of said work, said appellants notified the town and the appellee, and "objected to and remonstrated against the said grading and improvement of said alleged street and along and upon their said real estate."

The answers do not in any manner controvert the regularity of the proceedings or the making and completion of the improvement, in all respects, in compliance with the resolution and contract in relation thereto, except such irregularity as grows out of the fact that the strip referred to was included in the improvement as a part of the street, and that the grade was changed after the work was commenced.

It is not claimed that the change of the grade depreciated either the cost or value of the improvement, or that any of the appellants were injuriously affected thereby. Neither is it shown, by any direct averment, that the controverted strip so included in the street as

part of the improvement was taken and appropriated for that purpose without the consent of appellants.

It is alleged, it is true, that appellants "objected to and remonstrated against the said grading and improvement of said alleged street," but it is not averred that any of them, so far as our attention has been called thereto, objected and remonstrated to the fact that said strip was included in such improvement as a part of the street. The mere fact that a property-owner objects to the improvement of a street is no reason why he should not pay his assessment. If any objection was made in this case because the controverted strip was taken or because a change in the grade was made, such fact should have been clearly and specifically pleaded.

The only question presented on this branch of the case is, whether a change in the grade, which we must assume was to the advantage of both the street and adjacent property-owners, in connection with the fact that improvements so made were wider than the street, by reason of which an adjacent strip was appropriated and treated as a part of the street, constitute of and within themselves an absolute bar to a recovery of the assessment for the improvement of the street? If the improvement had been confined to the original street, appellants would certainly be liable.

Can they escape that liability entirely because the improvement was made of greater width? No authority has been cited which supports the contention of counsel on this point, and we do not believe such contention can be sustained on principle. If including a strip of fifteen feet in the improvement should, of itself, under the circumstances stated, be held sufficient to bar a recovery of any part of the assessment, we see no reason why a like result would not follow if one foot only was taken.

When jurisdiction was obtained in the manner pre-

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scribed by statute, the town had the right and the power to improve said street. Jurisdiction of the persons of appellants and also of the subject-matter of the proceedings having been obtained, the mere fact that the contractor, on his own motion or pursuant to the direction of the town, in the making of said improvement widened the street beyond its original limits, does not, in our opinion, invalidate the entire proceedings, and does not constitute a complete bar to an action to recover the benefits assessed against the adjacent owners for the improvement of the street. Whether such facts, if properly pleaded, would constitute partial defense, or whether in proper proceedings appellants can obtain redress for the taking of such strip without their consent, we need not determine. Our conclusion is that there was no error in sustaining the demurrer to the answers.

We next proceed to the consideration of the questions presented by the last error assigned.

After finding that the ordinance for the graveling, grading, guttering and paving the street in question was unanimously adopted by the board of trustees of said town on the 7th of March, 1892, the court further finds that the same was duly published in the Bloomfield News and the Bloomfield Democrat, two weekly newspapers of general circulation printed and published within the corporate limits of said town; that after the completion of said publication of said ordinance the said board of trustees advertised for bids for the construction of said improvement, by the publication of notice in said Bloomfield News for three successive weeks in the issue of said paper on the 1st, 8th and 15th days of April, 1892; that after the completion of said improvement, the making of the final estimate and report and the reference of such report to the proper committee, due notice was given by publication for two weeks successively in said

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Bloomfield News of the time and place, when and where a hearing could be had upon said report before said committee. A copy of said ordinance and of each of said notices are set out in full in the special finding.

The notice in relation to the ordinance or resolution for making the improvement is prescribed in section 813 Elliott's Supplement. The notice concerning the contract is prescribed in section 812, *supra*. The notice as to the hearing on the report is prescribed in section two of the act of March 8, 1891; Acts 1891, page 323. The finding clearly discloses that the notices last mentioned were given in all respects in the manner prescribed by the statute. The facts as to the publication of the other notice are not fully stated. It is found that such notice was published in two weekly papers in said town prior to the first of April, but the exact date of the insertions or the length of the publication is not specifically stated.

Notwithstanding this omission, however, the facts specially found on the question of notice show that the statute in this respect has been complied with, and are sufficient, so far at least as this point is involved, to uphold the conclusion of the trial court. *Sands v. Hatfield*, 7 Ind. App. 357; *Kiphart v. Pittsburgh, etc., R. W. Co.*, 7 Ind. App. 122; *DePuy v. City of Wabash*, 133 Ind. 336; *McEneney v. Town of Sullivan*, 125 Ind. 407; *Quill v. City of Indianapolis*, 124 Ind. 292; *Barber, etc., Co. v. Edgerton*, 125 Ind. 455; *City of Logansport v. Shirk*, 129 Ind. 352. See, also, *Johnson v. State, for Use*, 116 Ind. 374; *Otis v. DeBoer*, 116 Ind. 531; *Pickering v. State, for Use*, 106 Ind. 228.

It will suffice to say without analyzing these authorities or further discussing the question, that the reasoning of Judge ELLIOTT in *Barber, etc., v. Edgerton*, *supra*, and of Judge MITCHELL in *Garvin v. Daussman*, 114

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Ind. 429, are conclusive as to the sufficiency of the notices as found in the special finding.

The specifications in the ordinance that the street should be graveled and guttered according to the stakes set by the town civil engineer, to a width of twelve feet, and to a depth of twelve inches, with the best quality of raked river gravel, and the sidewalks graded to a width of twelve feet, and eight feet of the inner portion thereof graveled to a depth of four inches with the best quality of sidewalk gravel, and the gutters on each side of the street to be hammer dressed stone, gutter to be four feet wide and seven inches deep, all work to be done to the entire satisfaction of the town civil engineer, are not defective on the ground that the nature and extent of the improvement are not shown. *Ross v. Stackhouse*, 114 Ind. 200.

The finding on the question that the contract for making said improvement was entered into, and that the work was completed in accordance therewith to the satisfaction of the engineer is sufficient, especially in view of the further finding that on the completion of said improvement a final estimate thereof was made by the engineer, and reported to said board, and finally adopted without any remonstrance, objection or protest on the part of appellants. We have not undertaken to set out the facts as found in this opinion, but in our opinion the finding was full and ample on every point in issue in the case.

The thirty-ninth specification in the finding is as follows:

“That some time prior to the adoption and passage of said ordinance the said civil engineer surveyed and marked out said part of said street passing along and in front of said property of defendants a width of sixty feet to correspond with the other parts of said street, and designat-

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ing the boundaries of said street by placing stakes along the proposed sides of said street, which line of stakes so set by said engineer were sixty feet apart from side to side of said street, and including within said street so improved a strip on each side of said street not included as parts of said street prior thereto."

In addition to what we have heretofore said on this branch of the case, we only desire to call attention to the fact that in this case the town had jurisdiction of the subject-matter of the proceedings—that is to say, the town had jurisdiction to improve the street; and further, the town, through the notices given, also acquired jurisdiction over the persons of appellants. In other words, the street which it was sought to improve did exist.

The ordinance in a manner prescribed by statute, authorized and directed the improvement of such street, as we have hereinbefore shown. The street has been improved, but it does not appear to what extent the street has been widened, or whether this act was with or without the consent of appellants. The simple question presented by the answers, and also by the finding, is whether such act ousts the jurisdiction and invalidates the assessment.

The jurisdiction having been acquired, and the proceedings ordering the improvement having been regular, we are of the opinion that the fact that subsequently thereto the contract was entered into requiring the street to be improved beyond the limits of the street, as previously established, does not invalidate the entire assessment. See *Town of Marion v. Skillman*, 127 Ind. 130; *Ross v. Stackhouse*, *supra*, and authorities hereinbefore cited.

We do not find any reversible error in the record.

Judgment affirmed.

Filed Apr. 18, 1894; petition for a rehearing overruled Dec. 11, 1894.

Germania Fire Insurance Co. v. Columbia Encaustic Tile Co.

No. 1,154.

GERMANIA FIRE INSURANCE COMPANY v. COLUMBIA ENCAUSTIC TILE COMPANY.

INSURANCE.—Void Condition.—Immediate Notice.—A condition in an insurance policy requiring immediate notice of loss is void, but notice must be given in a reasonable time.

SAME.—Special Verdict, Insufficiency as to Notice of Loss.—The incorporation of evidence relating to notice of loss into the special finding will not supply the finding of notice as an ultimate fact.

SAME.—Condition Precedent.—Notice of Loss.—Special Verdict.—As notice of loss, unless waived, is a condition precedent to recovery, the special verdict must show a performance or a waiver thereof before there can be a recovery. And a failure to find performance or waiver is equivalent to a finding that such fact has not been proved.

SAME.—Special Verdict.—Evidentiary Facts.—Practice.—Motion for Judgment.—New Trial.—Where the matters found are mere evidentiary facts, they are equivalent to no finding at all, and, in such case, the question is properly raised by motion for judgment on the verdict or for a new trial.

SAME.—Special Verdict.—Notice of Loss.—Proof of Loss.—A finding upon the subject of "proof of loss" will not supply the finding of notice.

From the Marion Superior Court.

S. M. Shepard, for appellant.

V. Carter and W. T. Brown, for appellee.

REINHARD, J.—The appellee sued the appellant and recovered a judgment against it for a loss by fire upon an alleged contract of insurance on an encaustic tile factory and other property at Anderson, Indiana. The principal questions arising in the record are as to the sufficiency of the special verdict to support the judgment in favor of the appellee.

There are certain conditions precedent in the policy sued upon, which it is insisted have neither been per-

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formed nor waived. One of these provides that the insured, in case of any loss by fire on the property insured, shall give immediate notice thereof in writing. Appellant's counsel contend that the verdict fails to show a compliance with this condition.

A condition in a policy requiring immediate notice of loss is void, but notice must be given in a reasonable time. R. S. 1894, section 4923; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361; *Pickel v. Phenix Ins., etc., Co.*, 119 Ind. 291; *Insurance Co., etc., v. Brim*, 111 Ind. 281.

The seventh finding in the special verdict is the only one relating to the subject of notice. In it the jury find that the secretary of the company wrote a letter to Henry Coe, who, it is found in another place, was the appellant's agent. The letter is copied into the finding. The substance of it is that the daily report, dated March 8, 1892, concerning the Columbia Encaustic Tile Company, was received, and that the appellant, or rather the secretary, denies the authority of Coe to issue the policy. The jury then find that to this letter Coe sent an answer, which is also set forth in the finding. This letter is directed to the secretary, and bears date March 26, 1892. In it Coe advances some reasons for thinking that he had acted properly in the matter of issuing the policy in suit under which, it is intimated, a loss occurred. The finding then proceeds: "On March 28, 1892, the secretary of said defendant responded as follows, to wit:" (Here follows a copy of a letter purporting to have been written by the secretary to said Coe, in which the writer protests that Coe had no authority to bind the company by such a policy, and insists that Coe, and not the appellant, should be answerable for any damage under the policy.) This is all of the finding upon the subject of notice.

It is earnestly contended that this is not a finding of

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the ultimate fact of notice of the loss as required by the policy.

One of the issues tendered, and upon which the jury was required to find, was that notice of the loss had been given the appellant, in writing, within a reasonable time after such loss, or that the company waived such notice in the manner alleged in the complaint. Whether such notice was or was not given, in fact, is not found by the verdict. In lieu of the finding of such ultimate fact, the jury found that certain letters were written by the appellant's secretary and Coe, the company's agent at Indianapolis. It is not found when the letters, or any of them, were written, except the last one, nor that they were transmitted or received, nor that notice of the loss was served upon the appellant through them or either of them. The letters may have constituted sufficient evidence of such notice, but they were not a finding that notice had in fact been given, nor does the finding contain such fact.

In *Cottrell v. Nixon*, 109 Ind. 378, the questions for the jury to decide were whether there had been a sale and delivery of the property described in the complaint, and whether the defendant had agreed in writing to become responsible for certain payments. In that case, as in the one before us, the only finding upon the subject were the letters that passed between the parties, and it was there held, as we must hold, that the facts found were purely evidentiary and insufficient to support the verdict, although it was also held that a *venire de novo* was the proper remedy. It is not the province of the jury to find what the evidence was on any given question, but to find the ultimate facts upon such evidence. That notice in writing within a reasonable time was a condition precedent of the contract is not disputed by the appellee, nor is there any room for legitimate argu-

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ment upon this question. The appellee could not recover judgment upon the policy, therefore, until he had proved the performance of such condition, unless, indeed, performance was waived by the company. The verdict must, therefore, show a performance or a waiver. Hence, if there is a failure to find a performance or a waiver, the judgment on the verdict can not stand, for a failure to find an essential fact is equivalent to a finding that such fact has not been proved; and, in construing the verdict, the court will consider ultimate facts only, disregarding all evidentiary matters and mere conclusions. *Henderson v. Dinkey*, 76 Ind. 264; *Glantz v. City of South Bend*, 106 Ind. 305; *Louisville, etc., R. W. Co. v. Hart*, 119 Ind. 273; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Bartholomew v. Pierson*, 112 Ind. 430.

Had there been even a general finding upon the subject of notice, it might have been sufficient, in the absence of a motion for a *venire de novo*, or to make the verdict more specific. *Cook v. McNaughton*, 128 Ind. 410.

It was not necessary, in view of the special verdict in the present case, that appellant should have moved for a *venire de novo*. When the matters found are mere evidentiary facts, they are equivalent to no finding at all, and this being true, the question is properly raised by motion for judgment on the verdict, or for a new trial.

In *Louisville, etc., R. W. Co. v. Hart*, *supra*, it was expressly decided that if the verdict does not cover all the issues in the cause, or does not so far cover them that the plaintiff is entitled to a judgment, the question is not properly presented by a motion for a *venire de novo*, but by a motion for a new trial, or by a motion for a judgment on the verdict. See, also, *Johnson, Admr., v. Cul-*

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ver, Admx., 116 Ind. 278; Elliott App. Proced., sections 753, 756.

The case of *Branson v. Studabaker*, 133 Ind. 147, does not aid the appellant in its contention that the question here involved can only be presented by a motion for a *venire de novo*. In that case it was said: "It is well settled that a motion for a *venire de novo* lies only where the verdict upon its face appears to be defective in form; where it is against the evidence, or does not state a fact which the party believes the evidence establishes, the remedy is by a motion for a new trial. * * * Where the facts stated entitle a party to judgment, the proper mode of procedure is by a motion for judgment; or, if the motion of the adverse party * is sustained, the question of the sufficiency of the facts to support a judgment may be saved by a proper exception."

It is not decided by this case that the sufficiency of the facts in the general verdict to entitle a party to judgment must be raised by motion for *venire de novo*.

We think the rule established by the decisions is that where there is an absence of an essential fact in the special verdict, so that no judgment could be properly based upon the same in favor of the party having the burden of the issues, the adverse party may move for a new trial, or for a judgment on the verdict, or he may except to the sustaining of a motion for judgment in favor of the other party.

In the case at bar, the appellant moved for a judgment on the verdict, and also excepted to the ruling of the court in sustaining the appellee's motion for a judgment. This, we think, was all the appellant was required to do, in view of the special verdict. Had the verdict, in the particulars stated, been defective in form merely, the appellant might have been required to seek its remedy by some other motion.

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If the case of *Cottrell v. Nixon*, *supra*, would seem to lend any support to the appellee's contention that the only proper method of raising the question is by a motion for a *venire de novo*, we think the later cases hold to the contrary. Our conclusion upon this branch of the case is that there is no finding of any ultimate fact or facts from which the court is authorized to conclude that the notice of loss provided for in the policy was given.

Nor do we think the finding upon the subject of "proof of loss" will supply the finding of notice. It was found, on this subject, that on or about April 1, 1892, McGilliard & Dark (insurance brokers at Indianapolis) received from the appellee a "proof of loss," which subsequently found its way into the hands of the appellant.

There is nothing in the finding to show what this "proof of loss" contained, or the nature thereof, whether it was in writing or not, or what information it purported to convey, or that it contained or furnished the appellant or its agent with any notice or information whatever as to the loss of this property. The finding is clearly insufficient for any purpose. It is surely not a finding of the giving of any notice.

There is no finding anywhere that the condition as to notice was waived. The appellee relies upon the seventh finding to establish a waiver. But it no more establishes a waiver of the notice than it establishes the giving of the notice. As we have shown, it contains nothing other than the letters written by Coe and the appellant's secretary. This is evidence from which a waiver might or might not have been found, but it is not the finding of any fact or facts as to such waiver. Such fact or facts were essential in the absence of a finding of notice. There being no finding or showing that the appellee had complied with the condition of the policy referred to, nor

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that the same had been waived, the verdict is lacking in one or more of the elements necessary to form the basis of a valid judgment.

We think the appellant was, strictly speaking, entitled to a judgment upon the verdict.

There are other questions presented which may not arise again on another trial. We regard this as a case where the ends of justice will be best subserved by directing a new trial. Elliott App. Proced., sections 563, 564.

Judgment reversed, with directions to grant a new trial.

GAVIN, J., did not participate in the decision of this cause.

Filed Dec. 14, 1894.

CONCURRING OPINION.

DAVIS, J.—In my opinion, on the question of notice or waiver, a special finding of a jury, which contains letters, set out therein, which it is found were written and sent by one party and received by the other, constitutes a sufficient finding of such notice or waiver, when this is the only inference which can be reasonably drawn therefrom, without any further or additional finding by the jury on the subject.

I concur in the result in this case.

Filed Dec. 14, 1894.

The State, *ex rel.* Meriwether, Administrator, *v.* Walford *et al.*

No. 1356.

THE STATE, EX REL. MERIWETHER, ADMINISTRATOR, *v.*
WALFORD ET AL.

PLEADING.—*Complaint, Sufficiency of.*—*Action by Administrator for Death of His Decedent.*—*Wife, Children or Next of Kin.*—In an action by an administrator to recover damages for wrongfully causing the death of his decedent, the complaint to be sufficient to withstand a demurrer for want of necessary facts must show that the deceased left a wife, children, or next of kin.

OFFICE AND OFFICER.—*Liability for Wrongful Acts.*—*Acts Virtute Officii and Acts Colore Officii.*—If a wrongful act be done by a public officer, acting as such, he will be liable to the person injured on his official bond, and there is no legal distinction in this State between acts done *by color of office* and acts done *by virtue of office*.

From the Jennings Circuit Court.

J. B. Meriwether, for appellant.

Lutz, J.—This was an action on a constable's bond, instituted by the State on the relation of James B. Meriwether as administrator of the estate of Ed Thomas, deceased. The appellee Walford was the constable and principal in said bond, and the appellees Oglesby and Lutz were his sureties. The complaint was in two paragraphs. The first alleges in substance that Walford was duly appointed and qualified as a constable for Jeffersonville township, Clark county, Indiana, and executed his official bond in the penal sum of \$1,000, with said Oglesby and Lutz as his sureties, conditioned among other things that he would faithfully perform his duties as such constable as required by law. It is further averred that Walford did not duly, honestly and faithfully perform his duties as such constable as required by the terms of said bond and by the law, in that on June 2d, 1891, he, as such constable, had a warrant commanding the arrest of one Ed Thomas; that he did,

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under color of his office as said constable, undertake to execute said warrant and arrest said Thomas; that in executing said warrant he did "carelessly, negligently, and intentionally, without cause or reason, and without any notice to said Thomas that he was an officer or had a warrant or authority to make arrests, and without any warning to said Thomas, with a pistol loaded with powder and ball, did shoot, wound and injure the said Thomas, and from which injuries the said Thomas subsequently died.

The second paragraph of the complaint is much the same as the first, except there is no averment that the constable had a warrant; the arrest having been attempted under color of his office alone.

Walford demurred separately and Oglesby and Lutz jointly, assigning as a cause that neither paragraph stated facts sufficient to constitute a cause of action.

These demurrers were sustained, and appellant refusing to amend, judgment was rendered on demurrer. These rulings are assigned as error.

Whether the wrongful acts of the constable were done by virtue of his office or by color of his office does not very clearly appear from the allegations. An act done by virtue of an office is one within the authority of the officer. If in doing such act the officer exercises that authority improperly or abuses the confidence which the law reposes in him, he will be liable for the injury done. An act done by color of an office is one of such nature and character that the office gives the officer no authority to do. The authorities are all agreed that if a wrongful act be done by virtue of the office, the officer and his sureties will be liable on his official bond. *State, ex rel., v. Beckner*, 132 Ind. 371; *Commonwealth v. Cole*, 46 Am. Dec. 506, note.

But whether or not an officer and his sureties are lia-

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ble on his official bond for a wrongful act done by color of his office, there is much conflict in the adjudicated cases. Brandt Suretyship, etc., section 566, and cases cited in notes. In this State, however, it is settled that a public officer and his sureties are liable upon his official bond for wrongful acts done by color of his office as well as by virtue of his office. *State, ex rel., v. Druly*, 3 Ind. 431; *Snell v. State, ex rel.*, 43 Ind. 359; *State, ex rel., v. White*, 88 Ind. 587 (593).

This being true, the nice distinctions which prevail in some jurisdictions between acts done *virtute officii* and acts done *colore officii* do not maintain in this State. It follows that when a wrongful act is done by a public officer acting as such, he will be liable to the person injured, on his official bond.

The cause of action arising from the injury described in the complaint is one which at common law abated upon the death of the person injured.

The right to maintain such action after the death of the person injured is given by section 285, R. S. 1894. The action must be prosecuted by the personal representative of the deceased person, and the damages inure to the exclusive benefit of the widow and children, if any, or the next of kin. The amount of the recovery is not a penalty inflicted by way of punishment for a wrong done, but is intended to compensate the next of kin or those who were dependent upon the deceased and who had or are supposed to have had a pecuniary interest in his life. A complaint to recover such damages, in order to be good, must show that the deceased person left a wife, children, or next of kin. *Stewart, Admr., v. Terre Haute, etc., R. R. Co.*, 103 Ind. 44; *Burns, Admr., v. Grand Rapids, etc., R. R. Co.*, 113 Ind. 169; *Indianapolis, etc., R. R. Co. v. Keely's Admr.*, 23 Ind. 133.

The complaint in this case is wanting in such aver-

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ments, and for this reason, if for no other, it was insufficient to withstand the demurrers. We do not wish to be understood as holding, nor do we hold, that the representative of a deceased person may maintain an action on the bond of a public officer for causing the death of such person. It is sufficient, for the purposes of this case, to say that the complaint is bad for other reasons.

Judgment affirmed.

Filed Dec. 21, 1894.

No. 1,221.

BLONDIN v. OOLITIC QUARRY CO.

NEGLIGENCE.—Master and Servant.—Master Entrusting Performance of Duty to Fellow-Servant.—If an employe be injured while in the service of his employer, by the negligence of a coemploye engaged in the same general employment, when the master has exercised reasonable care in the selection of such coemploye, the employe who is thus injured can not, as a general rule, recover damages of his employer; but if the master entrusts the performance of a duty he owes directly to such injured servant to a fellow-servant, the negligence of the latter is the negligence of the master, and the master is liable to another servant who is injured by such negligence.

SAME.—Stone Standing on Edge Falling on Servant.—(See opinion for facts and liability.)

From the Owen Circuit Court.

J. W. Williams, J. R. East and R. G. Miller, for appellant.

W. H. H. Miller, F. Winter and J. B. Elam, for appellee.

REINHARD, J.—The appellant sued the appellee for damages for a personal injury sustained by him while in the employment of the appellee as a stone dresser in

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the appellee's quarry. The questions presented arise upon the ruling of the court in rendering judgment in favor of the appellee and against the appellant upon the special verdict. It appears from the verdict that the appellee was operating a stone quarry where it was engaged in quarrying, dressing and shipping stone for the market. On the day of the injury the appellant was employed by the appellee for the specific purpose of dressing stone and preparing the same for shipment after it had been quarried and placed in the stone yard "on a solid and steady surface, secure and safe to work upon and about." On the 15th day of June, 1892, the appellant, while in the line of duty was drawing a line on a stone lying north and south in said yard, with his face to the east, and while thus engaged, another stone lying north and south and immediately west of the appellant, fell over eastward and upon appellant's left leg, breaking the same between the knee and ankle, from which the jury found that the appellant sustained damages in the sum of \$1,000. The stone which fell upon and injured appellant was about ten feet long and from twenty to twenty-four inches wide and eight to nine inches thick. It had been placed in the yard by appellee by means of a derrick by direction of one Thomas Heaps, and had been set upon its side or edge so that it could be dressed, and was resting upon loose pieces of spawls and stone, without any props of wood or other supports, and in such manner as to allow it to settle down and turn over on its side suddenly; and by reason of not being thus propped and supported, it fell and injured the appellant, who had no knowledge of its unsafe condition, and had made no examination of the stone and how it was placed.

On the day of the injury, all the officers and proprietors of appellee's quarry were absent except Thomas Heaps, who had been left in charge of the quarry,

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ledge, machinery, and hands, with full power to control the workmen, the placing and moving of the stone, the arrangement of the stone for the cutters and dressers to work upon, and to set the same in a secure manner so that appellant and other stonecutters might dress the stone for shipment. At the time of the injury Heaps had exclusive control of the quarry and had full command of the men, with power to hire and discharge employes at the place where appellant was injured. The stone which fell on appellant had been sitting on its edge in the stone yard, in the unsafe condition in which it was when it fell, for two hours before the accident occurred, and could have been examined by Heaps, and its unsafe condition ascertained by him in ample time to have prevented the injury had he undertaken or made any effort to do so. It was the duty of the stonecutters, when they reached the stone to be dressed, to place spawls under such stone, and level it up, and to call other employes to help them, if necessary, in so doing, but the stone which fell upon the appellant had not been reached by him for the purpose of being dressed, nor by any other stonecutter. Appellant was required at other times to do ordinary labor about the quarry at less remuneration than he received for stonecutting, but at the time of the injury, his employment was exclusively that of dressing stone, and the duties connected therewith, as stated. Heaps had over him certain superior officers, but they were not present about the quarry on the day of the injury.

We think it was the duty of the appellee to furnish the appellant with a reasonably safe place in which to do his work, and the finding that appellee was to place the stone to be dressed on a solid and steady surface, secure and safe to work upon and about, shows that he had a right to assume that this had been done. It was

not his duty, therefore, to examine the stone about him to ascertain if they were all securely placed and free from danger of falling over while he was engaged in dressing other stone. It is true that the appellant assumed all ordinary risks incident to the employment, but we think the finding clearly shows that this was not one of the risks assumed. Nor is there any finding to indicate that the danger was so obvious as that the appellant must have perceived it, and that his failure to do so rendered him guilty of contributory negligence. The rule that the master owes the servant and employe the duty of providing him with reasonably safe places and appliances in the performance of his work, is not denied by appellee's learned counsel. *Krueger, Admr., v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Brazil, etc., Coal Co. v. Hoodlet*, 129 Ind. 327; *Bradbury v. Goodwin*, 108 Ind. 286; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Parke County Coal Co. v. Barth*, 5 Ind. App. 159.

It is contended, however, on behalf of appellee, that the case does not come within the rules just announced, inasmuch as the yard in which the work was being done was a safe and secure place, and there is no complaint that appellant was not furnished with proper appliances. We think, on the contrary, that the stone, which was shown to have been insecurely placed and negligently suffered to remain in that condition in close proximity to where the appellant was at work, was as much a part of the place where such work was being done as would have been a dangerous pitfall of which the appellant had not been apprised.

In *Parke County Coal Co. v. Barth*, *supra*, a coal miner was injured by the falling of a piece of slate from the roof of the passage way through which he entered the

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room in which he worked. In that case it was held by this court that it was the master's duty to keep such place reasonably safe, and that the servant had a right to assume that it was so kept, and that he was not required to inspect the premises for the purpose of discovering hidden dangers.

The finding in the present case expressly shows that under the terms of the contract of employment the appellee was in duty bound to place and keep the stone upon a safe and secure foundation, and we can conceive of no reason why the appellee should be exempt from liability from the consequences of its negligent failure to do so. That a stone of the dimensions of the one mentioned, when placed upon its edge, is likely to fall over at all events, can not be assumed by us. If this were true, there never would be any safety in working in proximity to the same, and the employes would of course always be negligent in attempting to do so. This, however, is not the theory of the defense, for it is urged, not that the appellant was negligent in working there at all, but in failing to inspect the foundation of the insecure stone, and in making the same secure himself. This, as we have seen, was not his duty, and he can not be held accountable for failure to do that which devolved upon his employer, or for reposing confidence in the latter as having performed that which its contract required it to perform.

It is further contended, however, that even if it was shown to have been the duty of Thomas Heaps to see that the stone were all placed securely, there could still be no liability on the part of appellee for the negligence of Heaps, inasmuch as he was only a fellow-servant of the appellant. It can make no difference, in our opinion, whether Heaps was a mere coservant with the appellant or whether he sustained the relation of vice prin-

cipal to the appellee. If it be true, as found by the jury, that the appellee was in duty bound to have the stone placed so as to render the place around it reasonably secure, it was negligence in the appellee to omit this duty, and the fact that the omission occurred through the fault of another servant can not relieve the appellee. As well might it be argued that because a railroad company had employed some one to look after defective machinery and appliances, and because such employe failed to discharge his duty, and caused the injury of another servant, therefore the company was not liable to the servant injured because the negligence was that of a fellow-servant.

If an employe is injured while in the service of his employer by the negligence of a coemploye engaged in the same general employment, when the master has exercised reasonable care in the selection of the coemploye, the employe who is thus injured can not, as a general rule, recover damages of his employer. But this rule has no application to a case where the master owes a duty to the servant directly. In such a case, if the master entrusts the performance of that duty to a fellow-servant, the negligence of the latter is the negligence of the master, and the master is liable to another servant who is injured by such negligence.

As said by ELLIOTT, J., in *Indiana Car Co. v. Parker*, *supra*: "In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself."

There are many facts found by the jury of an irrelevant and immaterial character, but we think, under the findings, the appellant was entitled to a judgment. The jury assessed the damages at \$1,000 in case the law was with the appellant, and we are of opinion that the court

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should have rendered judgment in his favor for that amount.

Judgment reversed, with directions to the court below to render judgment in favor of the appellant for \$1,000 and interest from the day of the trial and verdict.

Filed June 6, 1894; petition for a rehearing overruled Dec. 14, 1894.

No. 1,366.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. SLOAN.

PLEADING.—*Complaint, Necessary Allegations.—Master and Servant.—Railroad.—Defective Track.—Personal Injury of Brakeman.*—In an action by a brakeman to recover damages occasioned by the defective condition of the railroad track, the complaint must allege, to show a good cause of action, that the defective condition of the track at the place where defendant was injured was the result of defendant's negligence; or, if not due to defendant's negligence, that defendant knew of the defective and dangerous condition of the track a sufficient length of time prior to the accident to have repaired the same in the exercise of reasonable diligence; or that it was defective and dangerous for such a length of time prior to the accident, that defendant, in the exercise of reasonable care, should have discovered and repaired it.

SAME.—*Notice of Defective Condition, When Necessary to Allege, When Not.*—If the defendant placed the track in such defective and dangerous condition, it is not necessary to aver that defendant had notice thereof; otherwise such allegation is necessary.

RAILROAD.—*Negligence.—Change or Repair of Track.—Care.*—A railroad company has the right to make necessary changes or repairs in its track, but in making such changes or repairs, it is required, in the discharge of its duty to its employes, to use reasonable care to provide and maintain the same in reasonably safe condition for the performance of the duties required of its employes. Ordinarily it would be negligence to leave such work, at any time, in an unfinished condition longer than would be required, under the cir-

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cumstances, in the exercise of reasonable care and diligence, to complete the work.

SAME.—*Personal Injury of Brakeman.*—*Contributory Negligence.*—*Defective Track.*—A brakeman has the right to assume that the track is in a reasonably safe condition; and the fact that he might, on examination with his lantern, have disclosed the defective and dangerous condition of the track before stepping thereon between the cars, is not sufficient to charge him, as a matter of law, with contributory negligence.

EVIDENCE.—*Res Gestæ.*—*An Injured Brakeman.*—Statements made by an injured brakeman after he had been removed two hundred feet distant from the place of the accident, and ten minutes after he was injured, in relation to the manner in which the accident occurred, are not part of the *res gestæ*.

From the Benton Circuit Court.

E. P. Hammond, C. B. Stuart, W. V. Stuart and J. T. Dye, for appellant.

D. Fraser and W. H. Isham, for appellee.

DAVIS, J.—This was an action by appellee to recover damages for the death of his minor son, occurring while in appellant's service as brakeman. A demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was overruled. On this ruling arises the first question presented for our consideration. The negligence alleged as the basis of the action is that "said defendant had carelessly and negligently permitted its right of way and its railway track to become in a dangerous condition in this, to wit: That the iron rails upon which the wheels of the cars rest or run were spiked to wooden ties, which wooden ties were loosely and carelessly laid on top of the ground with no dirt or gravel lying in between said ties; that said ties were irregularly laid, so that in some places the ties were wide apart and in others close together; that said ties were not laid parallel, but on the contrary were laid obliquely, so that at one end they would be some two or three inches apart. That said track had been recently

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on said day raised and left temporarily in said condition; that by reason of the negligence and carelessness aforesaid of this defendant the track at said point was in an unsafe and dangerous condition, which fact was wholly unknown to plaintiff's son, the said William O. Sloan, and to plaintiff, but was well known to the defendant."

In order to state a good cause of action in this case, it is necessary to show by proper averments that the alleged defective and dangerous condition of the track at the place where the decedent was injured was the result of an act of negligence on the part of the appellant in constructing, changing, repairing or altering the track; or if appellant was not originally responsible for creating the alleged defective and dangerous condition, that the track afterwards became defective and unsafe, and that appellant knew of such defective and dangerous condition a sufficient length of time prior to the accident to have repaired the same in the exercise of reasonable diligence, or that it was defective and dangerous for such a length of time prior to the accident that appellant, in the exercise of reasonable care, should have discovered and repaired it. *Evansville, etc., R. R. Co. v. Duell*, 134 Ind. 156; *Town of Monticello v. Kennard*, 7 Ind. App. 135; *Board, etc., v. Stock*, 11 Ind. App. 167; *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210.

It will be observed that there is no allegation in the complaint that the alleged defective and dangerous condition of the track was the result of any act of appellant. The only allegation indicating the manner in which this defective and dangerous condition was created is the charge that the track had been recently on said day raised and left temporarily in said condition. It is not alleged, however, that the defective and dangerous condition was the result of raising the track. Neither is it

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alleged that appellant raised the track. In the absence of such averments, the court can not infer that the appellant raised the track on the day the decedent received the injuries which caused his death.

If appellant negligently placed the track in such defective and dangerous condition, it was not necessary to aver that appellant had notice thereof. If appellant did not do the act which caused the defective and dangerous condition of the track, then it was necessary to aver notice. It is alleged that appellant had notice of the defective and dangerous condition, but it is not shown that appellant had such notice, either actual or constructive, a sufficient length of time prior to the accident to have repaired the same in the exercise of reasonable care. Neither is it shown that such defective and dangerous condition of the track existed for such length of time prior to the accident that appellant, in the exercise of reasonable care, should have discovered and repaired it. If it appeared by any proper averment that appellant was responsible for the act that created the alleged defective and dangerous condition of the track, the general allegation of negligence in relation thereto, in connection with the other averments, would be a sufficient charge of negligence against appellant in the complaint.

A railroad company has the right to make necessary changes or repairs in its track, but in making such changes or repairs it is required, in the discharge of its duty to its employes, to use reasonable care to provide and maintain the same in reasonably safe condition for the performance of the duties required of its employes. In making such changes or repairs in its track, the railroad company may not be able at all times, and under all circumstances, by the exercise of reasonable care, to keep every part of the work in its usual and proper condition, but it ordinarily would be negligence to leave

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such work at any time in an unfinished condition longer than would be required, under the circumstances, in the exercise of reasonable care and diligence, to complete the necessary change or repairs.

On the question of contributory negligence, the complaint is sufficient. It is alleged that the unsafe and dangerous condition was unknown to said decedent, and also that his injuries were received without any fault or negligence on his part. He had the right to assume that the track at the point where he attempted to couple the cars was in a reasonably safe condition, and the fact that he might on examination, with the aid of his lantern—although the complaint does not disclose that he had a lantern—have discovered the defective and dangerous condition of the track before he stepped thereon between the cars, is not sufficient to charge him, as a matter of law, with contributory negligence. It is true the brakeman was required to exercise ordinary care, and to use his senses in the performance of his duties, but under the circumstances disclosed, and in the light of the averments that he was without fault, and that he had no notice of the unsafe and dangerous condition of the track, the court can not say the complaint shows that he was guilty of contributory negligence on the occasion when he was injured.

On trial by a jury, a special verdict was returned in favor of appellee, on which judgment was rendered against appellant. Appellant's motion for a new trial was overruled, and this ruling formed the basis of one of the errors assigned and discussed.

Over the objection and exception of appellant, a witness in behalf of appellee was allowed to testify as a part of the *res gestæ* to statements made by the decedent after he had been moved to another place two hundred feet or more distant, and ten minutes at least after he was in-

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jured, in relation to the manner in which the accident occurred. This was error. *Citizens' Street R. R. Co., etc., v. Stoddard*, 10 Ind. App. 278; *Parker v. State*, 136 Ind. 284.

It is not necessary to consider other questions discussed, as they may not arise on another trial.

Judgment reversed, with instructions to sustain the demurrer to the complaint, with leave to amend at cost of appellee.

Filed Dec. 14, 1894.

No. 1,483.

THE STATE v. ASHCRAFT.

CRIMINAL LAW.—*Unlawful Sale of Intoxicating Liquors.*—*Sufficiency of Indictment.*—An indictment charging that defendant “did * * unlawfully sell to * * at and for the price of five cents, a less quantity than a quart at a time, to wit, one pint of * * beer, he the said * * not then and there having a license under the State law to sell intoxicating liquors,” sufficiently states a criminal offense.

From the Jay Circuit Court.

R. H. Hartford, Prosecuting Attorney, *W. A. Ketcham*, Attorney General, and *M. Moores*, Assistant, for State.

GAVIN, J.—The indictment against appellee, omitting the formal parts, charged that he, “on May 30, 1893, at Jay county, Indiana, did then and there unlawfully sell to Grant Kikendall, at and for the price of five cents, a less quantity than a quart at a time, to wit, one pint of certain intoxicating liquor, to wit, beer; he, the said William Ashcraft, not then and there having a license under the State law to sell intoxicating liquors.”

To this indictment a motion to quash was sustained

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upon the ground, as we are informed by the prosecuting attorney, that it did not state that the defendant did not have license to sell intoxicating liquor "in quantities less than a quart."

The only license to sell intoxicating liquors authorized by our State law is one which permits the applicant to sell them in "less quantities than a quart at a time, with the privilege of permitting the same to be drunk on the premises as stated in the aforesaid notice." R. S. 1894, section 7283; R. S. 1881, section 5318.

The statute declaring the offense and its penalty is section 7285, R. S. 1894, and reads: "Any person, not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spirituous, vinous, or malt liquors in a less quantity than a quart at a time, * * * shall be deemed guilty of a misdemeanor," etc.

The indictment under consideration clearly shows a violation of this section of the statute.

While it would have been proper and sufficient to have averred that the defendant did not have a license under the State law to sell intoxicating liquors "in a less quantity than a quart at a time" (*Burke v. State*, 52 Ind. 522), there is nothing technical in this averment, which requires that precise language to be used. The offense denounced by the statute is selling intoxicating liquors in a less quantity than a quart without a license authorizing it.

If the party charged has no license authorizing him to sell intoxicating liquors (as is here averred), it follows necessarily that he has none permitting him to sell in less quantity than a quart at a time. The greater always includes the less.

Under the authorities, the want of a license is sufficiently charged. *State v. Buckner*, 52 Ind. 278, and

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cases cited; *State v. Wickey*, 57 Ind. 596, 2 Allen, 507, and cases cited; Gillett Crim. Law, section 576.

In *Howell v. State*, 4 Ind. App. 148, this court held the exact language of this allegation to be a sufficient negation of the possession of a license.

Judgment reversed, with instruction to the trial court to overrule the motion to quash.

Filed Dec. 14, 1894.

No. 1,361.

HEATON v. LYNCH ET AL.

PROMISSORY NOTE.—*Person Not Signing Note, Compelling Plaintiff to Join as a Defendant.*—The payee of a note can not be compelled to join as a party a person in a suit against the maker, who receives a part of the proceeds of the note and who agrees to pay such note.

PLEADING.—*Cross-Complaint.*—*Chancery Practice.*—The code does not provide for a cross-complaint, but the chancery practice of determining the rights of the parties on each side of a case is recognized by our decisions, and in such cases the rules of pleading and the practice of chancery courts, as modified by the spirit of the code, govern.

SAME.—*Discretionary Power of Court, Cross-Complaint.*—*Delaying Opposite Party.*—Under the statute providing that the court "may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves," the power to determine a controversy between the parties on the same side, as between themselves, is a discretionary one, and should not be exercised to the detriment of the opposing party by delaying his judgment. R. S. 1881, section 568.

PRACTICE.—*New Parties.*—A defendant to an action can not insist that a new party defendant be brought in to settle a controversy purely among the defendants which does not affect the plaintiff.

SAME.—*Sufficiency of Petition to Bring in New Parties.*—To make a petition sufficient, under section 277 (R. S. 1881), to bring in a new party, it must be shown that the party sought to be brought in is a necessary party, and it must contain a prayer for relief.

SAME.—*New Parties.*—*Demurrer Sustained to a Cross-Complaint.*—"In-

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terpleader Cross-Complaint," Party to.—If a person is only a party-defendant to a cross-complaint, and his demurrer is sustained to such cross-complaint, he can not be required to answer a separate and distinct pleading, called an "Interpleader Cross-Complaint," for he is not a party thereto.

DEMURRER.—*Argumentativeness.*—Argumentativeness is not a cause for demurrer, and to overrule a demurrer to an argumentative denial is not error. To sustain a demurrer to such answer is not erroneous if a general denial is on file, under which the same facts can be proven.

From the Decatur Circuit Court.

J. S. Scobey and J. M. Sharp, for appellant.

S. A. Bonner, M. D. Tackett and B. F. Bennett, for appellees.

REINHARD, J.—The Citizens' National Bank of Greensburg, Indiana, sued the appellant, Thomas Heaton, and the appellee Lynch on a promissory note for \$1,250, interest and attorney's fee.

Heaton appeared and filed what is termed in the pleading a "cross-complaint," averring that the note sued on was made for a loan of money by the bank to himself, Benjamin F. Lynch, and one Oliver Deem, and that said parties borrowed said money from said bank for their equal and joint use and benefit, and that they each equally owe and ought to pay the same, share and share alike, but that the name of said Deem is not upon said note as a maker thereof, he not being present at the time.

He prayed that Deem be made a party to the action, for process against him, and that he be required to answer, and for all proper relief.

He further prayed that Lynch be made a party and be required to answer.

Subsequently Heaton filed a second paragraph of pleading which he likewise denominates a "cross-complaint," setting forth the facts more fully than in the

first paragraph, and averring that the money for which the note was given was borrowed by said Heaton, Lynch, and Deem for their joint and equal use and benefit for the payment of certain machinery used by them in partnership in the business of boring and constructing gas and oil wells; that Deem was not present, and did not personally sign said note, the bank being willing to make the loan on the credit of the names of said Heaton and Lynch; that the said three partners did not use any partnership or firm name in the transaction of their partnership business, but used their individual names, etc. There was a prayer that Lynch and Deem "be made defendants to this cross-complaint, and that any judgment hereon and on said note rendered, be rendered equally, share and share alike, against said Heaton, Lynch, and Deem, and for all other proper relief."

Lynch and Deem filed separate demurrers to each of these pleadings. The demurrers were sustained, and the appellant excepted. These rulings are assigned as errors.

If the first paragraph of this pleading is sufficient to withstand the demurrer, it must be good either as an answer, a cross-complaint or a petition to make a new party. In order to be good as an answer, the averments of the pleading must constitute a bar to the matters averred in the complaint. A mere glance at the pleading will disclose that it contains nothing in bar of the action. Indeed, it does not profess to do so. As an answer it is clearly insufficient. Is the paragraph good as a cross-complaint? A pleading filed by one defendant against one or more codefendants, and showing that he is entitled to relief against him or them is a cross-complaint. *Browning v. Merritt*, 61 Ind. 425; *Wright v. Anderson*, 117 Ind. 349.

When such a pleading is filed by one defendant against

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one or more codefendants and another who is not a defendant, showing that the cross-complainant is entitled to relief against such parties as to matters not apparent on the face of the complaint, it is necessary that such new party should be made a defendant, and process should issue against him. *Swift v. Brumfield*, 76 Ind. 472.

Properly speaking, there is no such pleading known to our code as a cross-complaint. If the cross-proceeding be against the plaintiff, and grows out of the matters averred in the complaint as constituting the cause of action, it is a counter-claim. But, notwithstanding the silence of our code upon the subject of cross-complaint, the chancery practice of determining the rights of the parties on each side of a case is clearly recognized by our decisions, and in such cases the rules of pleading, and practice of chancery courts, as modified by the spirit of the code, govern. *Fletcher v. Holmes*, 25 Ind. 458; Pomeroy Rem., sections 806, 807, 808; Bliss Code Pl., section 390.

Hence, it has become the established practice of our courts that cross-actions may be resorted to between parties on the same side of a case, and the pleading filed in instituting such cross-action is known under our practice as a cross-complaint. While the mode of procedure is not prescribed by the code, and the chancery practice is proper to be resorted to in such proceedings, the basis of the procedure is nevertheless found in the statute (R. S. 1894, section 577; R. S. 1881, section 568), which provides that the court "may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." Under this provision, it has been held that the power to determine a controversy between parties on the same side, as between themselves, is a discretionary one, and should not be exercised to the detriment of the opposing

party, by delaying his judgment. *Manning v. Gasharie*, 27 Ind. 399.

While this is the rule as applied to parties already in court, it is further true that the liberal provisions of our code for making new parties defendant, at the instance of one already a defendant, may not be invoked when the controversy between such defendant and new party is purely between themselves and could not affect the right of the plaintiff to recover. *Fischer v. Holmes*, 123 Ind. 525; *Frear v. Bryan*, 12 Ind. 343; *Bennett v. Mattingly*, 110 Ind. 197.

In the present case, it is quite apparent from the first paragraph of the pleading under consideration, we think, that there was no unity of interest between the plaintiff and Deem. The latter, according to the averments of this paragraph, was not a party to the contract between the bank and the makers of the note. It is true that it is alleged that the note was made for a loan of money by the bank to Heaton, Lynch and Deem for their equal and joint use and benefit, but it is not shown that Deem was a maker of the note, or ever agreed to pay the same, or was in any way connected with its execution, but it is expressly averred that he was not present and "is not upon said note as a maker thereof." What the arrangement may have been between Heaton, Lynch and Deem can not affect the bank, unless Deem was in some way a party to the contract with it. It may be true that the loan was made to all three of the parties, and yet if the bank chose to accept the note of two of them, and these were willing to and did execute such note, we are unable to see upon what principle the bank could be compelled to pursue Deem for any portion of the money for which the note was given. How can Deem be made liable to pay any portion of a note, attorney's fee and interest included, when it is not shown that he ever executed it,

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and his name not only does not appear to it, but it is affirmatively shown that he had nothing to do with its execution? He may, indeed, be liable to the makers in a separate action, if it be shown that the money was obtained in part for his benefit, or used in an enterprise in which he was jointly interested with them. But this does not concern the plaintiff and is a matter purely between the defendants and Deem. We do not think, therefore, that the court erred in sustaining the demurrer to the paragraph under consideration.

Nor was it sufficient as a petition to make a new party.

By section 278, R. S. 1894 (R. S. 1881, section 277), it is provided that "when it is necessary for the defendant to bring a new party before the court, he may state the matter relating thereto in his answer, and demand relief; and thereupon a summons shall issue and other proceedings be had against him as if such matter had been exhibited in the original complaint."

To make a petition, or "answer," as it is denominated, sufficient, under this section, two things must appear in its contents: It must be shown that the party sought to be brought in is a *necessary* party, and there must be a prayer for relief. *Conklin v. Bowman*, 11 Ind. 254.

As both of these essential elements are absent, the paper, as a petition, is insufficient under the section referred to. Deem was not a necessary party, for he was not a party at all to the contract declared upon.

The appellant insists, however, that Deem should have been made a party under section 273, R. S. 1894 (R. S. 1881, section 272) which provides that when a complete determination of the controversy can not be had without the presence of other parties, the court must cause them to be joined as proper parties.

It is sufficient to say, in answer to this position, that the controversy in litigation, *i. e.*, the promissory note

in suit, could be fully decided upon between the parties to the same without bringing in a stranger to the contract.

The rule already stated, that a new party should not be made merely for the purpose of settling matters between him and the defendant or defendants, is fully applicable to this section. *Frear v. Bryan, supra; Fischer v. Holmes, supra; Bennett v. Mattingly, supra.*

The appellant has an ample remedy against Deem, after payment of the judgment, by a suit for contribution. We think the first paragraph of this so called cross-complaint was insufficient for any purpose, and that the court did not err in sustaining a demurrer to it.

As to the second paragraph of this pleading, the record shows that after the sustaining of the demurrer to it, the appellant filed an amended second paragraph, and this (amended) paragraph was left out of the record by order of the appellant. The filing of the amended paragraph took the original out of the record. *Elliott's App. Proced.*, sections 595, 683.

There is no discussion in appellant's brief as to the sufficiency of the amended paragraph, but even if there were, it would not avail him, as the pleading is not in the record. It is the duty of an appellant to bring into the record every proceeding and ruling upon which he predicates error, as otherwise the presumption is conclusively in favor of the correctness of the ruling of the trial court. *Elliott's App. Proced.*, section 195.

Hence, if any error was committed upon this ruling, it is not available.

Lynch filed a cross-complaint against Heaton and the bank, alleging that he was only a surety on the note for Heaton. To this pleading, Heaton filed an answer in two paragraphs, the first being a general denial. In the amended second paragraph he averred that the debt sued

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on was a partnership transaction between Heaton, Lynch and Deem; that it was given to meet a partnership debt for certain machinery used in boring gas, oil and other wells, and that all three of said alleged partners were equally liable thereon.

There was a prayer "that said Deem, who has been made a defendant in this cause, and has pleaded therein, be ruled to answer said cross-complaint and all the premises, and that any judgment herein rendered be an equal one against said three parties, and for all other relief." To this paragraph Deem filed a demurrer, and it was sustained. This, the appellant insists, was reversible error.

The appellee's counsel contend, on the other hand, that the pleading referred to was at most but an argumentative denial, and that any evidence that was proper to be given in its support was fully available, and was in fact given under the general denial. There was no prayer to make Deem a party defendant, but, as has been shown, it was assumed and averred that Deem was already a party, and had pleaded in the cause. The only appearance by Deem, as we have seen, was the filing of his demurrer to Heaton's cross-complaint, which was sustained, and Deem went out of court. He was, therefore, not a party to the pleading denominated as an "interpleader-cross-complaint," and could not be required to take notice of the same.

As to Lynch, we are of opinion that his counsel's contention that the second paragraph of this pleading was but an argumentative denial must prevail. It is true that argumentativeness is not a cause for demurrer, and hence if a demurrer to an argumentative denial be overruled there is no available error. But where a demurrer to an argumentative denial is sustained, and there is also a general denial under which the same facts may be

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given in evidence, it is not error to sustain the demurrer to such argumentative denial. *Tewksbury v. Howard*, 138 Ind. 103; *Messick v. Midland R. W. Co.*, 128 Ind. 81.

The third specification of errors calls in question the correctness of the court's ruling in sustaining the demurrers of the appellees to the "interpleader cross-complaint" of the appellant. This pleading is but a repetition, in a more extended form, of the first paragraph of Heaton's cross-complaint, and for the reasons already stated, in passing upon the ruling of the court as to the sufficiency of that instrument, must be held insufficient also. It expressly shows that Deem was not a party to the contract with the bank, whatever may have been the arrangements and relations between Heaton, Lynch and Deem as to the debt for which the note was given. Deem was not a necessary party to this pleading, and as to Lynch it states no cause of action against him.

The fourth and last assignment of errors relates to the ruling of the court in striking out the pleading just referred to. The disposition of the question upon the demurrer must at all events settle this point also. But there is another reason why this assignment can not avail the appellant. While the record discloses the filing of the motion it nowhere appears that it was ever ruled upon by the court. Appellee's counsel claim that the motion was never submitted to the court. As the record shows no ruling, there is nothing to review.

We have thus examined all the alleged errors discussed by counsel, and find no cause for a reversal.

Judgment affirmed.

GAVIN, J., did not participate in the decision of this cause.

Filed Sept. 26, 1894; petition for rehearing overruled Nov. 27, 1894.

Bozarth v. Mallett.

No. 1,401.

BOZARTH v. MALLETT.

ment.—Clerical Error.—The appellate tribunal oftentimes disregards manifest clerical mistakes; yet it can not, under this guise, supply a material averment entirely omitted from the complaint.

PLEADING.—Complaint.—By Assignee.—A complaint by assignee of a cause of action must, to be good, show an assignment to plaintiff.

SAME.—Complaint.—Failure to Show Cause of Action in Plaintiff.—A complaint must show cause of action in favor of plaintiff, else it will be insufficient on demurrer for want of facts.

From the Porter Circuit Court.

N. J. Bozarth, for appellant.

A. D. Bartholomew, for appellee.

GAVIN, J.—This suit was brought by the appellee to foreclose a street-assessment lien. It is asserted by appellant that the only proper mode of collecting such assessments is by following the provisions of section 4298, R. S. 1894. In this we think he is in error. It is expressly stated in section 4294 that as to those assessed more than \$50, who do not elect to take the benefit of the ten years' time allowed them, and those whose assessments are less than \$50, the assessments "may be collected according to the provisions of amended section 10 of this act (being said section 4298), or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed, in any court of competent jurisdiction."

As claimed by appellee, this action was founded upon the assessment and not upon the contract for the improvement nor the order given to the contractors for the contract price of the work. *Dugger v. Hicks*, 11 Ind. App. 374; *Van Sickle v. Belknap*, 129 Ind. 558.

This being true the order filed as an exhibit can not be looked to to aid any defective averment of the pleading. *Fuller v. Cox*, 135 Ind. 46, and cases there cited.

It is claimed by appellant that his demurrer, for want of facts, should have been sustained, because it appears from the averments of the complaint that the firm of L. Frakes & Co. were the contractors who did the work and that they sold and assigned the order issued to them for the work to "Eggleston, Mallett & Brawsell," but there is no allegation of an assignment from this firm to the plaintiff, nor is there any other averment of an assignment of the assessment or the money due upon it other than as may be inferred from this averment.

This position we are compelled to sustain. It is probable that the omission of such an allegation results from the oversight of counsel in preparing the complaint or from the want of care of the typewriter in preparing the transcript, yet we must take the transcript as we find it.

While this court will oftentimes disregard manifest clerical mistakes, yet we can not under this guise supply such a material averment entirely lacking in the complaint.

Appellee seeks to avoid the catastrophe by taking the position that it is simply a question of defect of parties defendant (Bozarth being the sole defendant), which is waived by failure to present it specifically as a cause of demurrer. This contention can not be sustained.

A demurrer for want of sufficient facts being the fifth statutory ground under section 339, R. S. 1881, calls in question not only whether or not a cause of action is stated against defendant in favor of any one, but also whether any cause of action is stated in favor of the plaintiff which she is entitled to sue upon and enforce. *Louisville, etc., R. R. Co. v. Lohges*, 6 Ind. App. 288; *Farris v. Jones*, 112 Ind. 498; *Board, etc., v. Kimberlin*, 108 Ind. 449; *Frazer v. State, for Use*, 106 Ind. 471; *Walker, Admx., v. Heller*, 104 Ind. 327; *Pence v. Aughe, Guar.*, 101 Ind. 317; *Bond v. Armstrong*, 88 Ind. 65.

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The allegations of this complaint leave whatever cause of action does exist upon the facts pleaded in the firm of Eggleston, Mallett & Browsell and not in the plaintiff, and is therefore bad. *Holman v. Langtree*, 40 Ind. 349; *Green v. Louthain*, 49 Ind. 139; *Richardson v. Snider*, 72 Ind. 425; *Derry v. Morrison*, 8 Ind. App. 50.

A number of other objections are urged to the complaint, such as that it fails to aver directly that the appellant's property bordered upon the part of the street improved, or that the work was completed according to the contract.

It may also be added that it does not appear most satisfactorily that the appellant came within either of the two classes against whom foreclosure was authorized under section 4294, *supra*. What weight should be given to these and some other objections urged we need not now determine, since any doubt may be easily removed by amendments which will probably be made.

The judgment is reversed, with instructions to sustain the demurrer to the complaint, with leave to amend.

Filed Dec. 13, 1894.

 No. 1,357.

BARTLETT, EXECUTOR, v. BURDEN.

APPELLATE COURT PRACTICE.—*Weight of Evidence.*—*Preponderance.*—

The appellate tribunal will not weigh conflicting evidence and determine which side has the preponderance.

SAME.—*Excessive Recovery.*—*Question, How Raised.*—Before the question of excessive recovery can be raised on appeal, it must first have been made the ground of a motion for a new trial.

SAME.—*Argument in Support of Error Assigned.*—*What not Sufficient.*—

To simply state that instructions do not state the law, and should not have been given, without presenting any argument pointing out

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wherein they are erroneous, or citing any authorities in support of the assertion, is not such discussion of the question as will be deemed sufficient to require its consideration.

WITNESS.—*Claimant Against Decedent's Estate.—When Competent.*—

Where a claimant has been called to the witness stand, and was sworn and testified as a witness for the decedent's estate, the barrier to her competency as a witness was removed, and she may testify in her own behalf.

EVIDENCE.—*Tax-assessment List.—When Properly Excluded.*—Where, in an action on a claim against a decedent's estate the preliminary proof shows that the assessment list offered in evidence against the claimant was not hers, and that she did not sign it, there was no error in excluding the tax list from the evidence.

From Delaware Circuit Court.

J. N. Templer and E. R. Templer, for appellant.

J. W. Ryan and W. A. Thompson, for appellee.

Ross, C. J.—The appellee filed a claim consisting of notes and accounts against the estate of her deceased husband, Nehemiah Burden, amounting to twenty-eight hundred and two dollars and fifteen cents. Of this claim the appellant allowed the sum of ten hundred and forty-three dollars and fifty cents and rejected the balance. The appellee refusing to accept the allowance, the claim was transferred to the issue docket, and upon a trial by jury was awarded twenty-seven hundred dollars. The court, after overruling appellant's motion for a new trial, rendered judgment on the verdict.

It is insisted by counsel that the verdict of the jury is not sustained by sufficient evidence. In support of this contention counsel say: "It is a fundamental principle of our law that in order to recover in a civil action, the plaintiff must do so by a preponderance of the evidence." Then, after calling attention to the testimony of a number of witnesses concerning the genuineness of one of the notes embraced in the claim, continuing, say: "Now, out of this list of witnesses two give their opinion that

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the note in controversy was the note of the decedent, while three, who are best calculated to know all about his signature, testified that in their opinion it was not his signature, and not his note."

Counsel, in pursuing this line of argument, seemed to have overlooked the rule which prevails in this court relative to the court's right to consider the conflicting evidence and determine upon which side it preponderates, hence we will repeat that this court never attempts to weigh conflicting evidence and determine which side has the preponderance. That is the province of the jury, and when they have once decided and their decision has received the approval of the trial court, this court will not disturb the verdict and judgment on the weight of the evidence.

In this case there is some evidence to sustain the verdict. The question which counsel seek to raise is the excessive amount of the recovery. To raise that question properly the motion for a new trial should have stated as one of the reasons therefor that there was error in the assessment of the amount of recovery, the same being too large. No such reason was assigned in the motion for a new trial filed in this cause.

The eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth causes in the motion for a new trial relate to the giving of instructions, but counsel in urging the incorrectness of these instructions, simply say: "We believe that instructions 6, 7, 9, 13 and 15 are wrong and the court erred in giving them." To simply state that instructions do not state the law and should not have been given, without either presenting any argument pointing out wherein they are erroneous or citing any authorities

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in support of the assertion, is not such a discussion of the question as will be deemed sufficient to require its consideration by this court. Unless a question is argued in counsel's brief it will be deemed waived.

It is next urged that the court erred in permitting appellee to testify in her own behalf.

In this we think there was no error for the reason, first, that she was called to the stand, sworn and testified as a witness for the appellant, thus removing the barrier to her competency as a witness imposed by section 506, R. S. 1894; and second, because no proper objection was made to her testifying, and exception saved.

Neither was there any error in refusing to admit in evidence the tax assessment list offered by appellant, for the reason that the proof made by appellant, preliminary to the introduction of the assessment sheet, showed that the same was not hers and that she did not sign it. If she did not make it, either personally or through some one authorized to act for her, it was not competent as evidence against her.

A careful examination of the record in this case convinces us that the cause was fairly tried in the court below and a just result reached.

We find no error for which the judgment of the court below should be reversed.

Judgment affirmed.

Lotz, J., took no part in this decision.

Filed Dec. 13, 1894.

The Cleveland Stone Co. v. The Monroe County Oolitic Stone Co.

No. 1,306.

THE CLEVELAND STONE COMPANY v. THE MONROE
COUNTY OOLITIC STONE COMPANY.

ASSIGNMENT OF ERRORS.—*Independent Assignment.*—*Overruling Motion to Strike Out.*—*Not Ground for New Trial.*—The overruling of a motion to strike out a complaint is not proper cause for a new trial, but must be asserted by independent assignment of error.

APPEARANCE.—*General.*—*Jurisdiction of Person.*—If a party has entered a full appearance to an action, no error can be predicated upon the overruling of a demurrer to the amended complaint, upon the ground that the court had no jurisdiction of the person of the plaintiff.

INTERROGATORIES TO JURY.—*Refusal to Submit.*—*When not Error.*—*Record.*—Where the record does not show that interrogatories were presented to the court before the commencement of the argument, there was no error in refusing to submit them to the jury.

From the Lawrence Circuit Court.

M. F. Dunn, for appellant.

J. H. Loudon, W. H. Martin and T. J. Loudon, for appellee.

GAVIN, J.—The appellee brought suit against appellant, a nonresident corporation, by complaint and attachment, in the Monroe Circuit Court, recovering judgment by default. Appellant afterward appeared, procured the default to be set aside and obtained leave to defend the action.

A rule to answer was entered, whereupon the venue of the cause was, upon appellant's affidavit and motion, changed to Lawrence county, where the appellee, by leave of court and over appellant's objection, filed an amended complaint, which the appellant ineffectually sought, by motion, to have stricken out. The correctness of the court's action in these respects has not been challenged by any assignment of error in this court. No question is therefore presented with reference to them.

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Such rulings relative to the pleadings were not proper causes for new trial. They did not directly relate to matters connected with the trial, and therefore belong to the class of rulings in which error must be asserted by independent assignment of error, such as motions to strike out, to compel answers to interrogatories to be made more specific, and the like. *Ringgenberg v. Hartman*, 102 Ind. 537; *Reed v. Spayde*, 56 Ind. 394; *Bowman v. Phillips*, 47 Ind. 341; *Hamilton v. Elkins*, 46 Ind. 213; Elliott's App. Proced., section 846.

The issues were closed by an answer of general denial with several affirmative paragraphs and also a counterclaim with proper pleadings thereto. The trial resulted in a verdict for appellee for \$901, upon which judgment was entered over appellant's motion for a new trial and exceptions.

No error can be predicated upon the action of the court in the overruling of the demurrer to the amended complaint, upon the ground that the court had no jurisdiction of the person of the appellant, because it had already entered a full appearance to the action. This having been done, it was too late to question the jurisdiction. *Nysegander v. Lowman*, 124 Ind. 584.

The decision in this case sustains the ruling of the trial court in permitting the filing of the amended complaint.

The only other assignment of error argued by counsel brings to our consideration the motion for a new trial.

The complaint counts upon a written contract, by the terms of which appellant bought from appellee ninety thousand cubic feet of No. 1 limestone from their quarry in Monroe county, Indiana, to be delivered f. o. b. cars at said quarry at certain fixed prices, all to be furnished by December 1, 1891, to be shipped in the name of appellant and "to be in good merchantable condition."

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It also provided that appellant was not to permit more than 8,000 feet of stone to accumulate at the quarry at any one time.

Appellee sought to recover for stone furnished and not paid for, \$751, with the further sum of \$300 for damages resulting from appellant's failure to order stone fast enough to prevent its accumulating in the quarry in an amount in excess of 8,000 feet, whereby appellee was put to expense in moving it about the quarry.

We are of opinion that the court was right in its construction of the contract, in holding that it required appellee to deliver No. 1 merchantable stone on the cars at appellee's quarry. If the stone was No. 1 and in merchantable condition there and then, the contract was complied with.

This question was properly submitted to the jury with explicit instruction [to take into consideration the fact, if proved, that the stone froze or burst upon its arrival at Chicago.

Had appellee been required, by its contract, to deliver the stone in Chicago, then the question might well be whether the stone was merchantable upon its delivery there. Such, however, is not the agreement.

Counsel criticise the position taken by the trial court, saying that it entirely disregarded the presence of latent defects, and authorized a recovery if the stone was apparently sound with no visible defects. The charges given do not seem to us susceptible of this interpretation.

The authorities sustain appellee's contention that there was no error in the refusal of the court to submit certain interrogatories to the jury, because the record does not disclose that they were presented to the court before the commencement of the argument. *Morris v. Morris*, 119 Ind. 341; *Sherfey, Admr., v. Evansville, etc., R. R. Co.*, 121 Ind. 427.

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Whether or not the stone delivered was such as was called for by the contract, was a disputed question as to which the evidence was conflicting. We can not, therefore, disturb the finding of the jury upon this fact.

We find in the record no cause for reversal.

Judgment affirmed.

Filed Dec. 12, 1894.

No. 1,385.

BROWN v. HARNESS.

ARBITRATION.—Award.—When Upheld.—Intendment—Technical Objections.—When an award has been made by arbitrators, the policy of the law forbids that the controversy should again be opened, except it be impeached by fraud, corruption, partiality, or undue means, or other misconduct on the part of the arbitrators; and for the purpose of sustaining an award, technical objections should be disregarded, and every fair intendment should be drawn to uphold it.

SAME.—Correcting or Modifying Award After it has been Filed in Court.—Miscalculations, misdescriptions, and imperfections in form in the award, when apparent upon the face of the record, may be corrected or modified after the award has been filed in court.

SAME.—Motion to Strike out Exceptions.—When not Error to Sustain.—Where exceptions to an award are based upon facts extrinsic to the record, and no fraud or misconduct is charged against the arbitrators, which objections could have been presented to the arbitrators and a determination thereon had before the award was completed, it was not error to sustain a motion to strike out such exceptions.

SAME.—Scope of Inquiry.—Exception to Award.—Partnership.—Evidence.—Where the scope of the inquiry of arbitrators is limited to partnership matters, they exceed their authority when they go beyond partnership affairs; and when such question is presented by exception, evidence may be heard for the purpose of determining whether or not an item is embraced within the subject-matter of the controversy.

From the Howard Circuit Court.

Brown v. Harness.

J. C. Blacklidge, C. C. Shirley and B. C. Moon, for appellant.

M. Bell and W. C. Purdum, for appellee.

Lorz, J.—The appellant and appellee were partners engaged in buying and selling live stock. Certain differences arose between them concerning their partnership business. They selected three persons to arbitrate the differences existing between them. It was agreed that the report of the arbitrators should be made a rule of the Howard Circuit Court. The arbitrators awarded the appellee the sum of \$718.86.

When the report was filed in the circuit court the appellant appeared and moved to modify and correct said award, and filed six separate exceptions thereto.

The appellee moved to strike out these exceptions.

The court overruled the motion as to the first and sustained it as to all the others.

The appellant assigns these adverse rulings as error, and the appellee assigns as a cross-error the overruling of the motion as to the first exception.

In the second exception the appellant alleged that the arbitrators, in making their award, and in the consideration of the matters submitted to them, made a miscalculation of the figures and proof offered as to an item of \$300, giving the same no consideration whatever, which item of \$300 was received in the way of cash by the appellee, and of and from the appellant at the town of Galveston, Cass county, Indiana, on the 15th day of April, 1892; that in the addition and calculation of figures and the matters of difference, said arbitrators either forgot to allow appellant credit for said item or made a miscalculation of the same to that extent, and for which the appellant was entitled to credit.

The third exception is similar in character to the sec-

ond, and embraces two items, one of \$206.65 and the other of \$21.75.

The fourth exception proceeds upon the same theory as to an item of \$252.25.

The fifth proceeds in the same manner as to an item of \$450.

The sixth simply sets forth the aggregate amount of all these items, which amount is \$1,230.65.

The settlement of controversies by arbitration is favored by the law and encouraged by the courts, and for the purpose of sustaining an award, technical objections should be disregarded, and every fair intendment should be drawn to uphold it. It is a determination or result reached by a tribunal selected by the parties themselves, and the policy of the law forbids that the controversy should again be opened except it be impeached by fraud, corruption, partiality or undue means or other misconduct on the part of the arbitrators. Section 857, R. S. 1894.

The law, however, will permit a correction or modification of the award when there is an evident miscalculation of the figures or mistake in the description of any person or thing, or when the arbitrators shall have awarded upon some matter not submitted, or when it is imperfect in some matter of form not affecting the merits of the controversy. Section 858, R. S. 1894.

The evident purpose of the statute is to prevent an inquiry into the merits of the controversy after the award has been filed in court. The corrections or modifications of the award with reference to miscalculations, misdescriptions and imperfections in form are only those that arise upon the face of the record. *Deford v. Deford*, 116 Ind. 523.

Neither the 2d, 3d, 4th, 5th nor 6th exceptions arise upon the face of the record, but are attempted to be

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brought into it by the averment of extrinsic facts. No fraud or misconduct is charged against the arbitrators. Every one of these objections could have been presented to the arbitrators and a determination thereon had before the award was completed. They each presented matters about which a controversy existed. The proper tribunal to settle them was the board of arbitrators, and not the court. There was no error in sustaining the motion to strike out these exceptions.

The first exception to which the court overruled the motion to strike out, alleged, in substance, that the arbitrators exceeded their authority and power in that they included in the balance found due the appellee an item of \$65 which was no part whatever of the partnership affairs or dealings between them, and in no wise growing out of the partnership business; that said item was the purchase-price of a horse purchased by the appellant from the appellee, and for which the appellant executed his note payable to appellee, and which appellee now holds with a credit of \$30 thereon.

A copy of the agreement to submit to the arbitration is made a part of the record, and we think it appears upon its face that only partnership matters were to be submitted to the arbitration. The second subdivision of section 858, *supra*, provides that the court may modify or correct the award "When the arbitrator or arbitrators shall have awarded upon some matter not submitted and not affecting the merits of the decision upon the matters which were submitted." The scope of the inquiry of the arbitrators is limited by the agreement, and this, we think, is apparent upon the face of the record. When the arbitrators went beyond the partnership affairs they exceeded their authority. Under this exception, the power of the court is limited to ascertaining whether or not this item was or was not a partnership matter, and

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evidence might be heard for that purpose only. This is not equivalent to opening up the matters in controversy, but is simply ascertaining whether or not an item or thing is embraced within the subject-matter of the controversy.

We are of the opinion that there was no error in overruling the motion to strike out this exception.

Appellant insists that there is as much reason for sustaining the motion to the first exception as to the other exceptions. It will be seen, however, that the other exceptions relate to miscalculations, while this one relates to a matter not within the controversy. The scope of the inquiry being apparent upon the face of the record, but whether a particular item or thing is within the inquiry can only be determined by the allegation of extrinsic matter. An objection of this kind goes to the power and authority of the arbitrators, and not to their method of procedure.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,564.

OLDFATHER v. ZENT.

ACTIONS CONSOLIDATED.—Inherent Power of Court.—When May Be Exercised.—The power to consolidate causes is one of the inherent powers of the court, when the consolidation will expedite its business, prevent costs and a multiplicity of suits, when one action will answer all the purposes of justice.

SAME.—Appeals.—When May Be Consolidated.—Where an appellant, in the Appellate Court, after the term at which the judgment appealed from was rendered, files his complaint for a new trial on account of new evidence discovered after the term at which judgment was rendered, to which a demurrer was sustained, from which decision an appeal is also prosecuted to the Appellate Court, the two causes may be consolidated.

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From the Marshall Circuit Court.

J. W. Parks, W. D. Frazer and H. S. Biggs, for appellant.

L. W. Royse, C. P. Drummond, J. D. Widaman and C. W. Watkins, for appellee.

Lorz, J.—On the 6th day of January, 1892, the appellee, John S. Zent, filed his complaint in the Kosciusko Circuit Court against the appellant, Samuel W. Oldfather, to recover damages for a prosecution alleged to have been maliciously instituted by the appellant against the appellee. The venue of the cause was changed to the Marshall Circuit Court. In that court the issues joined were submitted to a jury and a verdict returned, on which the court on the 19th day of June, 1893, rendered judgment against the appellant in the sum of \$1,750.

From this judgment Oldfather prosecuted an appeal to this court, which appeal is now pending herein and undetermined, being cause numbered 1,548, and entitled: Samuel W. Oldfather, appellant, v. John S. Zent, appellee. The only error assigned in said cause is the overruling of the motion for a new trial. On the 9th day of March, 1894, Oldfather filed his complaint in the Marshall Circuit Court against Zent praying that he be granted a new trial on account of new evidence discovered after the term at which judgment was rendered. This latter proceeding was based upon section 572, R. S. 1894. The court sustained a demurrer to this complaint. The appellant excepted to this ruling and has appealed that cause to this court and assigns this ruling as error in this court.

The appellant has filed a motion to consolidate the latter cause with the first, for the reason that the purpose of the latter is to secure a new trial of the first.

The appellee insists that there is no statute authorizing the consolidation of causes in this court. There are special statutes which authorize the circuit court to consolidate causes in certain highway and drainage proceedings, and causes to foreclose mechanic's liens; but there is no general statute authorizing the consolidation of causes either in the circuit or appellate courts. The power to consolidate causes, however, is one of the inherent powers of a court. A court should always be possessed of the power to make orders which will expedite its business, prevent costs and a multiplicity of suits when one will answer all the purposes of justice. Gould Pl., p. 207; Elliott App. Proced., section 20. The question here presented is whether or not this is a proper case to exercise the power and order a consolidation.

A complaint or action for a new trial after the term under section 572, *supra*, is an independent proceeding, and from a judgment or order of the court granting or refusing to grant a new trial, an appeal will lie. *Sanders, Admx., v. Loy*, 45 Ind. 229; *Hines v. Driver*, 100 Ind. 315; *Hines v. Driver*, 89 Ind. 339. While this is true, the ultimate object of the proceeding is to obtain a new trial of the cause already merged into a judgment. In its effects it is virtually a motion for a new trial but differing in its method of procedure in obtaining the result sought.

If the first appeal should be reversed, and the lower court directed to grant a new trial we would have this anomalous condition resulting: A cause pending in this court seeking a new trial where a new trial had been already granted. The appellee might be put to the trouble and expense of showing this state of facts in order to procure a dismissal of the second appeal. If the first appeal should be affirmed, and the second reversed, a new trial does not necessarily follow. The order of

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the court would be to overrule the demurrer to the complaint, and proceed to try the issues joined. The trial might or might not result in an order for a new trial. The immediate purpose of the first appeal is to obtain a new trial, and the ultimate purpose of the second appeal and proceeding is to secure the same result. We are of the opinion that a consolidation will prevent delay, costs and a possible confusion of the record.

It may be necessary in disposing of the consolidated cause to pass upon the merits of both appeals in order to determine the matter of costs. But when the records of both are before the court a proper order or judgment can be made. It is, therefore, ordered that this cause No. 1,564 be and is hereby consolidated with cause No. 1,648, and that hereafter it shall take the title and number of said latter cause.

Filed Dec. 19, 1894.

No. 1,425.

THE MIDLAND RAILWAY COMPANY ET AL. v. THE STATE,
EX REL. HARRISON.

TAXES.—*Suit on Delivery Bond.*—*Averments of Complaint.*—In a suit on a bond given to secure the release of personal property levied upon, the averment that the taxes were properly levied by the proper board of county commissioners, for State, county, school and other purposes, in a certain amount, is sufficient to include all the precedent steps requisite to make a valid tax.

SAME.—*Same.*—*Demand for Redelivery of Property.*—In a suit on such a bond, wherein it is specified when the property shall be redelivered to the county treasurer, a demand before bringing suit need not be made.

SAME.—*Excuse for Failure to Redeliver Property.*—If the defendant has any excuse for his failure to redeliver the property, he must set it up in his defense; such a defense as that the property was not owned by the person against whom the taxes were assessed.

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SAME.—*Allegation that Article Levied on was Personal Property.*—In a suit on such a bond it is not necessary to allege that the article levied on was personal property.

SAME.—*Failure to Use Dollar Marks in Assessment Sheets.*—A failure to use the dollar mark (or any other similar sign) in front of the amount of the valuation of property in the assessment sheets does not render the assessment void; and this is especially true if it can be gathered from the entire assessment that the dollar mark was intended to be used but was accidentally omitted.

SAME.—*Proof of Validity of Tax Assessment.*—In an action on a delivery bond given to recover the possession of personal property levied upon for taxes, the plaintiff is not required to prove that the taxes were legally assessed. R. S. 1881, section 6498.

EVIDENCE.—*Certified Tax Assessment.*—A copy of the assessment made for taxation by the State board of equalization, certified by the auditor of State, is competent evidence, in a proper case, to collect taxes; and if it differ from the abstract certified by that officer down to the county auditor, it may be adopted instead of the abstract if there be a mistake in the latter.

PRACTICE.—*Erroneously Excluding Testimony.*—*Error Cured.*—If testimony is erroneously excluded in examination of a witness in chief, but it is admitted in cross-examination of such witness, the error is cured.

NEW TRIAL.—*Amount of Judgment Correct.*—*Erroneous Basis of Assessment.*—If the judgment is correct in amount, it is immaterial that the court adopted an erroneous basis in assessing the amount due.

From the Clinton Circuit Court.

W. R. Crawford, S. O. Bayless and C. G. Guenther, for appellants.

S. M. Ralston, M. Keefe, C. M. Zion and A. G. Smith, Attorney-General, for appellee.

GAVIN, J.—The relator, Harrison, was, during the year 1890, treasurer of Boone county, through which the Midland Railway extended. In May, 1890, the delinquent tax duplicates came into his hands for collection. On them were nearly \$2,600 of taxes assessed against said railway company for the years 1888 and 1889. In order to collect these he, after demand, on July 20, 1890, levied on a "Midland" engine, No. 8, then in the possession

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of said company. The appellants, being said company and its sureties, in order to obtain the engine, executed a statutory delivery bond conditioned as follows: "Whereas, J. S. Harrison, as treasurer of Boone county, Indiana, has this day levied upon one locomotive, number eight, of the value of three thousand dollars, to satisfy the taxes, penalty and costs for the year 1889 and the previous years, due from the said Midland Railway Company. Now, if the said Midland Railway Company shall deliver said property to said J. S. Harrison at 10 o'clock A. M. of the 26th day of September, 1890, at the Midland Railway shops, in Lebanon, Indiana, to be sold to pay said taxes, penalty and cost, or will then and there pay to the said J. S. Harrison the full amount of said taxes, penalty and cost, then this bond shall be void, else in full force."

Under this bond the engine was received back by the company, but was not returned to the treasurer, as required by the bond, nor were the taxes paid. This suit was then commenced upon the bond to recover the amount due on account of the taxes, being much less than the penalty in the bond.

Appellants' joint demurrer to the complaint was overruled, with an exception. They then answered, and the cause was tried by the court.

The judge, at the request of defendants, found the facts specially, with conclusions of law in favor of the appellee, for whom judgment was then rendered over appellants' motion for new trial.

The rulings on the demurrer and motion for new trial are the foundations upon which this appeal is based.

Counsel urge that in order to make a good complaint upon this delivery bond, it is essential that a legal and valid tax must be shown as the basis of the duplicate levied by the officer, and that to show such a tax it is

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necessary that the complaint should exhibit in detail the taking of every step required by the statute in assessing and levying the tax, following the principles of law laid down in *Gavin v. Shuman*, 23 Ind. 32; *McCann v. Jean*, 134 Ind. 518, and many kindred cases wherein the validity of tax titles has been in controversy.

Upon this theory, it is contended that an appraisal is essential to a valid tax, and that the complaint fails to allege one to have been made by the State board of equalization.

It must be borne in mind that there is a radical difference between cases where the title to the land is asserted by virtue of a tax deed and those which involve simply the collection of the amount due. *Jackson v. Smith*, 120 Ind. 520 (524).

It is true that in an action on a delivery bond given for property seized under an ordinary execution, the Supreme Court has held that the complaint must show a valid judgment back of the execution, and this holding has been followed by this court. *Midland R. W. Co. v. Eller*, 7 Ind. App. 216; *Strange v. Lowe*, 8 Blackf. 243.

We are, however, by no means ready to decide that so strict a rule would apply where the property is sought to be released from a tax liability. But granting, without deciding, this to be the rule, we are of opinion that the allegations of the complaint are sufficient to withstand the objection urged against it.

The averment is, as to part of the taxes at least, "That there was also duly and legally assessed by the board of commissioners of Boone county and other proper authorities, for State, county, school and other purposes, the sum of \$1,288.74," etc.

This general allegation was sufficient to cover all the precedent steps requisite to make a valid tax.

In *Noland v. Busby*, 28 Ind. 154, it became necessary

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that a treasurer should justify his seizure of a horse by a tax duplicate legal on its face. Objection was made to his answer, on the ground that it failed to show a duplicate legal on its face, because it did not aver in detail the various matters necessary to make it so. The pleading was not so strong as that in this case, but the Supreme Court said: "This we think is sufficient. To show by specific averments that the duplicate was made out, in every particular, in the form and manner required by the various provisions of the statute relating to the subject, would require an answer of great length and prolixity, to avoid which the law allows in such cases general pleadings. The rule is stated by Chitty thus: 'It is also a rule of pleading that where a subject comprehends a multiplicity of matter, and a great variety of facts, there, in order to avoid prolixity, the law allows general pleading.' 1 Chitty Pl., 235 (535)."

The rule laid down in *Vogel v. Vogler*, 78 Ind. 353, and other cases following it, relates to complaints showing on their faces special assessments on omitted property, and not the regular levies made in regular course. It can not, therefore, be deemed applicable to cases like the one in hand.

It has evidently not been the purpose of the law to favor controversies at law over the validity of tax assessments, by suits involving the right of the officer, with a regular duplicate in his hands, to enforce it against personal property. It is absolutely forbidden to question the validity of the tax by a replevin suit.

We are unable to perceive any good reason why the taxpayer should be permitted to avail himself of objections to the validity of the tax in cases of this character. It might, perhaps, be held that the recitals in the bond estopped him to deny that the taxes for the years named

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were due. *May v. Johnson*, 3 Ind. 449. We are not, however, called upon to go so far.

The bond required the redelivery of the engine upon a specific day. No demand was therefore necessary in order to put the appellants in default upon its failure to comply with the terms of the bond. *Midland R. W. Co. v. Eller*, *supra*; *Hunter v. Brown*, 68 Ind. 225; *Mitchell v. Merrill*, 2 Blackf. 87.

The provision of the statute R. S. 1894, section 8573 (R. S. 1881, section 6429) is, that the delinquent may retain the possession of such property for sixty days, and until the day of sale, by giving a bond, etc., conditioned that such personal property will be delivered at the door of the court house of the county or such other place as the treasurer may designate, "and at the time named therein, to be sold by such treasurer at public auction." By virtue of this statute the treasurer might fix a time beyond the sixty days for the delivery, but in the language of the Supreme Court, "As the time and place of the delivery were specified in the bond, it was the duty of the defendants to deliver the property, or pay as stipulated for without demand." *Hunter v. Brown*, *supra*.

If appellants were possessed of a valid excuse for their nondelivery by reason of a failure to advertise the property for sale upon the day named for its return, this was matter of defense.

The case of *Wright, Exx.*, v. *Manns*, 111 Ind. 422, related to a delivery bond in an attachment suit which, by the terms of the bond and the statute, only required a delivery upon demand, no specific time being named in the bond.

The holding there that a demand was necessary can not support appellant's position.

It is also insisted that the levy was bad because the complaint fails to show the treasurer's demand for pay-

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ment with the delinquent list in his actual possession at the place of the demand, in strict compliance with the terms of section 6435, R. S. 1881, counsel claiming that this is the only mode of procedure allowed. We are quite strongly inclined to the opinion that the demand is sufficiently alleged, but it has been decided that this section does not furnish the only authority for a levy and sale by the treasurer, but that under section 6433 and others, he has authority to collect delinquent taxes at any time by levy and sale. The objection, therefore, fails. *Adams v. Davis*, 109 Ind. 10 (on p. 17).

We are also of opinion that no express allegation was necessary to show that the locomotive, when not in use was personal property. As between the taxgatherer and the company, at least, such would certainly be the presumption in the absence of contravening facts. 19 Am. and Eng. Encyc. of Law 882.

We have considered all the objections to the complaint presented by appellant's learned counsel, and are unable to sustain them. The complaint was sufficient to withstand each and all of them.

Under the motion for new trial, numerous errors are urged. We will first take up those concerning the admission of evidence. At the outset we desire to say that we consider in the opinion only those grounds of objection which are argued here, and were also presented to the lower court at the trial. This is in harmony with the well settled law.

Counsel discuss the admissibility of the State auditor's certificate of the valuation of appellant's railroad property in 1888. Its admission was not, however, presented as a reason for new trial, and no question can, therefore, be here made with relation to it.

The admission of the auditor's certificate for 1889 is made a cause for new trial. The only argument urged

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against it, which was presented to the court below, is that there was in it no valuation or basis of valuation, because there is, in the certificate, no dollar or other mark before the figures intended to fix the value, nor any words to indicate whether the unit of value was dollars, mills, cents or bushels. In support of this proposition counsel cite *Lawrence v. Fast*, 20 Ill. 339; *Land v. Bommelmann*, 21 Ill. 142, which follows it, and *Woods v. Freeman*, 1 Wall. 398, which also follows it upon the ground that a question of Illinois law was under consideration, and the decision of the Illinois Supreme Court was deemed conclusive thereon. The case of *Lawrence v. Fast*, *supra*, simply holds that a judgment for taxes is invalid for uncertainty, when it was for the recovery of 248 simply.

This case was, however, followed to the full extent claimed by appellant's counsel in *People v. San Francisco Savings Union*, 31 Cal. 132, which held an appraisement invalid for want of a dollar mark or sign, their ruling being based solely on the cases to which we have referred. Illinois itself, however, has expressly repudiated the doctrine, as applied to an appraisement, which is what we are now considering.

In *Chickering v. Faile*, 38 Ill. 342, and *Elston v. Kenicott*, 46 Ill. 202, it was decided that such a defect does not invalidate a tax assessment.

To the same effect are *Cahoon v. Coe*, 52 N. H. 518; *State v. Eureka Co.*, 8 Nev. 15, and *Bird v. Perkins*, 33 Mich. 28, the opinion being by Cooley, J.

In each of these cases the rule laid down in *Lawrence v. Fast*, *supra*, is held inapplicable to a tax appraisement.

It is our judgment that these latter cases are the better authority, and that no man can have any reasonable doubt as to the unit of value adopted by the State board of equalization in appraising the railroads of the State.

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The context and the subject-matter under consideration, taken in connection with the duties of such officers, as fixed by law, make this reasonably certain at least. In the abstract or certificate under consideration, the dollar mark does appear at the head of one column of figures thus, "\$500." This furnishes indubitable evidence of the unit of value adopted, not only for the valuations in that column, but for all the others.

The evidence clearly establishes a sufficient demand for the taxes before levy. The making of the levy was abundantly proved by parol. Whether or not there was better evidence, which might have been required, is immaterial since no objection was offered to the character of the evidence by which the proof was made.

It is also probable that the appellants were estopped by the recital in the bond to deny that there had been a levy. *May v. Johnson, supra*; *Love v. Kidwell*, 4 Blackf. 553; *Atkinson v. Starbuck*, 7 Blackf. 420; *Lucas v. Shepherd*, 16 Ind. 368; *Wiseman v. Lynn*, 39 Ind. 250; *Gray v. State, ex rel.*, 78 Ind. 68; *Crisman v. Matthews*, 1 Scam. (Ill.) 148; *Portis v. Parker*, 8 Tex. 23.

If the property levied upon did not belong to the company, and this excused appellants from a delivery, this was matter of defense to come from the appellants. *Prima facie* they were required to comply with the bond. If they do not, they should show why not. The authorities go no further than to permit such a fact to be shown as a defense. *Midland R. W. Co. v. Eller, supra*; *Koeniger v. Creed*, 58 Ind. 554; *Long v. U. S. Bank*, 1 Free. Ch. (Miss.) 375.

The burden then being upon appellants, in the absence of any finding upon this question, it stands found against them. *Sinker, Davis & Co. v. Green*, 113 Ind. 264.

We are not prepared to say that this finding is unsustained by any evidence. Although the direct testimony

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offered by appellants is to the effect that the company did not own the engine, the possession of the company and the attendant circumstances were such as to authorize the contrary finding.

Objection is made to the admission of the certified copy of the assessment for 1889 made by the State board of equalization, because it varies from the abstract certified down to the county auditor by the State auditor in 1889. This being a certified copy of the original assessment, its admissibility did not hinge upon its being in harmony with the other evidence upon that subject. Furthermore, it was within the province of the court to determine, as it doubtless did, that there was a clerical error in the abstract certified down in 1889, in that it stated the year to be "1888" instead of "1889." Such an error, however, would not avoid and invalidate the levy of taxes made in accordance with the appraisement and assessment of the State board for that year.

Under our statutes, officers in charge of public records are authorized to make certified copies of such records, whether they came into existence during their term of office or not, and such copies may properly be used as evidence. R. S. 1894, section 466; R. S. 1881, section 462; *Painter v. Hall*, 75 Ind. 208.

This paper under consideration does not purport to be a copy of the abstract certified down to the county auditor, but it is a copy of a record then on file in the State auditor's office.

No objection was made in the court below to the form of the certificate.

Further objection is urged to the introduction of "parts of a certain printed statement regarding the meeting of the State board of equalization." It is doubtless an oversight that counsel have not referred us to any place in the record where this question is either

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presented or saved. The only matter we find which could come under this head is what seems to be an appraisal of right of way improvements amounting to \$400. Whether this came from a printed copy of the board's proceeding or whether properly or in what manner certified does not in any way appear. Taking it to be what counsel, in their objection, claim, it is still only the duplicate of the certified abstract which had already gone in evidence without objection. It, therefore, really added nothing to what was before proven. The error, if any, was utterly harmless.

Appellants offered in evidence a bill of sale purporting to be executed by the Pennsylvania Co. to Henry Crawford for an I. & V. engine No. 707. There was no evidence to prove the execution of this document, nor any offered or given which indicated that the I. & V. engine No. 707 was the Midland engine No. 8 levied on by appellee. There was consequently no error in refusing to admit it.

Error is also urged on account of the court's refusal to receive evidence of H. Crawford, Jr., "showing that the Midland Railway Co. was not the owner of engine No. 8, but that such engine was the property of Henry Crawford." Without deciding whether or not the cause assigned in the motion for a new trial was sufficiently definite to present any question in this court, it is sufficient to say that the evidence of Crawford upon cross-examination covered this ground quite fully, so that whatever error there was in the original rulings was cured by the subsequent admission of the evidence. *Mitchell v. Hindman*, (Ill.) 37 N. E. Rep. 916.

Counsel contend that, by the terms of the bond, appellants were only required to pay the amount of the taxes, penalty, and costs due at the time of its execution, and that the court erred in its finding in adding to this

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amount the 6 per cent. penalty on the 1889 tax, which attached to this tax in November, 1890. If this be true, appellants were not harmed thereby.

Upon their theory, appellants would be liable to pay the amount due on the taxes at the time of default with 6 per cent. interest from that time, which would have amounted to much more than the sum added as a penalty. If the court adopted a wrong basis to ascertain the amount of the recovery, appellants received the benefit of it, and can not now complain.

We have thus considered numerous objections urged by appellant's counsel, although many of the matters relied upon by appellee might have been regarded as wholly unnecessary, and the rulings on their admission therefore immaterial. The appellee seems to have assumed the burden of proving the various steps necessary to make a valid tax and levy from the listing or report made by the officers of the corporation to the seizure of the engine by appellee.

The statute relieved appellee from proving that the taxes were legally assessed. They were found regularly assessed upon the tax duplicates, and the statute provides that all taxes assessed upon any property in this State shall be presumed to be legally assessed. R. S. 1881, section 6498; *Adams v. Davis*, 109 Ind. 10.

Our State is not alone in having statutes of this character and giving them such effect. We find similar holdings in suits to collect taxes in other States. *Scott v. People*, 33 N. E. Rep. 180; *State, ex rel., v. Maloney*, 20 S. W. Rep. 1064; *Modoc County v. Churchill*, 75 Cal. 172; *City of Muskegon v. S. K. Martin Lumber Co.*, 86 Mich. 625.

Our conclusion in the case is that there is no error in the record which would justify a reversal.

Judgment affirmed.

Filed Sept. 18, 1894; petition for a rehearing overruled Jan. 9, 1895.

The Shipman Coal Mining and Manufacturing Co. et al. v. Pfeiffer.

No. 1,358.

THE SHIPMAN COAL MINING AND MANUFACTURING COMPANY ET AL. v. PFEIFFER.

PLEADING.—*Counterclaim.*—Under the code, a counterclaim embraces both recoupment at common law and the cross-bill in equity.

REPLEVIN.—*General Denial.*—Anything which will tend to defeat plaintiff's claim of title, or right of possession, in replevin, may be given in evidence under the general denial.

EXECUTION.—*Levy on Property of Person Assuming Judgment Debt.*—If a stranger to a judgment agree to pay it off, that will not authorize the levy of an execution issued thereon, upon such person's property.

SAME.—*Consolidation, Levying Execution on Property of Consolidated Companies for debt of old Company.*—If two corporations consolidate under the name of an execution defendant corporation, and the latter supersede the old corporation, assuming all the liabilities, and succeeding to all its rights and privileges, such execution against the old binds the personal property of the new corporation.

SAME.—*Sale of Stranger's Property.*—The sale of the property of a person not a party to a judgment and execution is void.

From the Fountain Circuit Court.

L. Nebeker and D. W. Simms, for appellants.

J. E. Florea, for appellee.

REINHARD, J.—This is an action of replevin by the appellee against the appellants. In his complaint, the appellee alleges that he is the owner and entitled to the possession of "one Wardevill channeller and cutting tools, consisting of forty-two steel bits, six foot, six-inch cut," and "one Ingersoll sargent-bar channeller and drill, and tools, consisting of twenty-two steel bits," all of the value of \$316, which is detained from him by the appellants without right, etc. Upon the filing of the proper affidavit, a writ of replevin was issued and the property seized by the sheriff. The appellants filed an answer in two paragraphs, the first of which is a general denial,

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and the second what the appellants' counsel denominate a counterclaim to set aside the sale of the property in controversy, at sheriff's sale, under which the appellee claims title. To this pleading the appellee filed a reply in two paragraphs, one of which was a general denial, and the other matter in avoidance of the second paragraph of the answer. There was a trial by the court and a finding that the plaintiff (appellee) was the owner and entitled to the property in controversy, and that the value thereof was \$325. A motion for a new trial by the appellants, both as to the complaint and counterclaim, was filed and overruled, and judgment was entered upon the finding in appellee's favor. Both appellants have assigned errors jointly, and the appellant corporation has also assigned separate specifications of error. The principal question discussed relates to the sufficiency of the evidence to sustain the finding.

It is earnestly insisted by appellant's counsel that under the evidence the appellants were entitled to a finding in their favor upon the complaint, and also to have the sheriff's sale to the appellee of the property in controversy set aside, under the counterclaim. The appellee's counsel contend, on the other hand, that there is evidence tending to support the finding upon the complaint, and that, as to the so-called counterclaim, it amounts to no more than an answer in bar, and that it was treated as such by the court and by the appellants themselves in the trial of the cause.

It is also insisted by appellee's counsel that if the paragraph under consideration is to be treated as a counterclaim, there is nothing to appeal from, as there was no finding or judgment against the appellant upon such counterclaim, nor any motion for such a finding or judgment, or for a modification of the judgment rendered.

The pleading under consideration alleges, in answer

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to the complaint and affidavit in replevin, "and as a complete bar to the said proceedings," that the defendant, J. Newton Dexter, has never had or claimed any interest in or title to the property in controversy, except for and on behalf of his codefendant, and that all things done by him in regard to said property were done on behalf of his said codefendant; that the plaintiff's title is based upon a sheriff's sale made on a certain execution in favor of Samuel Abbott against a certain corporation named the Illinois and Indiana Stone and Manufacturing and Improvement Company, on a judgment of \$140.61, rendered in the Fountain Circuit Court, October 8, 1892; that an execution was issued on said judgment to Vermillion county, October 17, 1892; that on October 20, 1892, said execution was levied on a certain farm, consisting of 110 acres of land of the value of \$10,000, and that after two offers of sale said execution was returned indorsed "no sale for the want of bidders;" that said levy was never released nor in any other manner disposed of, but that on September 17, 1893, said judgment plaintiff, ignoring said levy, caused a pretended alias execution to be issued to the sheriff of Fountain county against the said Illinois and Indiana Stone and Coal Manufacturing Company; that the amount for which said execution was issued was excessive as to costs; that the sheriff proceeded without serving said execution upon any one, seized the property in controversy and advertised a sale of it for November 17, 1893, giving barely ten days' notice, and fixing the time of sale between 10 o'clock A. M. and 4 o'clock P. M., and designated the place of sale as "the coal mine of the Shipman Manufacturing Company;" that said sheriff made a hurried sale of the property soon after 10 o'clock, and struck off said property in controversy to the plaintiff for \$30; that the property so sold was worth \$2,000, as

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the said sheriff and plaintiff knew; that plaintiff did not pay the purchase money till 1 o'clock P. M. of said day; that in the meantime the Shipman Mining and Manufacturing Company offered to pay the sheriff the full amount of said judgment and costs, which the sheriff accepted and received, except the sum of \$30, which he refused to take unless the plaintiff would waive his claim, which the latter refused to do, but insisted on paying and completing his bid; that before the commencement of this action the defendant tendered said plaintiff \$55 gold coin on account of any claim he had concerning said property and that said tender has been kept good in court; that the property in controversy formerly belonged to said execution defendant, but that in December, 1892, this company (appellant) bought the same for a good and sufficient consideration and has ever since owned the same; that defendant company, as part of the consideration, agreed to pay the debts of said execution defendant, but never became a party to said judgment in any manner whatever, and that said Pfeiffer has no other claim or title whatever.

The prayer of the pleading is that the pretended sale by the said sheriff be set aside and held for naught; that the plaintiff take nothing by this suit; that the defendant, The Shipman Coal, Mining and Manufacturing Company, be adjudged the owner of said property, and for all proper relief.

The affirmative reply admits that plaintiff claims title by virtue of the sheriff's sale, and avers that the purchase by the defendant company of said property was for no consideration except the assumption of the debts of the said execution defendant; that for reasons set forth the defendant company is identical with said execution defendant; that defendant company was careless about attending the sale; that plaintiff attended the sale and

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purchased the property in good faith, believing all the proceedings to be regular.

A counterclaim, under the code, is any matter arising out of, or connected with, the cause of action, which might be the subject of an action in favor of the defendant, or tend to reduce the plaintiff's claim for damages. R. S. 1894, section 353 (R. S. 1881, section 350). It embraces both recoupment at common law and the cross-bill in equity. *Woodruff v. Garner*, 27 Ind. 4; *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254.

It will be observed that the plaintiff in the present action was not the execution plaintiff in the proceedings which terminated in the sale of the property to him. So far as the record discloses, he was an entire stranger to the proceedings up to the time of the sale to him by the sheriff. The execution or judgment plaintiff is not a party to this action. If the pleading before us is a counterclaim, or a cross-action to set aside the sale, it seems to us that Samuel Abbott should be a party, so as to afford him an opportunity to defend the sale which is here attacked. If the pleading recognizes the *prima facie* validity of the sale, but seeks to set it aside on account of mere irregularities for which the appellee was not responsible, it appears to us that this would be a collateral attack upon the appellee's title. If the sale was merely voidable, but not absolutely void, the appellants should have gone into court with proceedings to set it aside. The pleading may, however, be treated as a plea of property in the appellee, and if it discloses absolute ownership in him, it will be sufficient as an answer in bar, although the facts set forth may perhaps have been given in evidence under the general denial. *Baldwin v. Burrows*, 95 Ind. 81.

Anything which will tend to defeat the plaintiff's
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claim of title, or the right of possession, in replevin, may be given in evidence under the general denial. *C. Aultman & Co. v. Forgey*, 10 Ind. App. 397.

We do not mean to decide that there may never be a case in replevin in which a counterclaim may be proper, as in cases of ejectment, for the recovery of real estate purchased at sheriff's sale. *Gilpin v. Wilson*, 53 Ind. 443.

If the action were between the execution plaintiff and the defendant, a counterclaim of this character might be upheld, though it is by no means certain that the facts could not be proved under the general denial without such plea. But in the present case, as we have said, the pleading, when considered as a cross-bill to set aside the sale, must fail, as it introduces into the cause matter which is foreign to the subject of the complaint, though the same matter may be sufficient when pleaded as an answer in bar. *Douthitt v. Smith, Admr.*, 69 Ind. 463; *Standley v. Northwestern, etc., Life Ins. Co.*, 95 Ind. 254; *Miller, Admr., v. Roberts*, 106 Ind. 63.

We think the answer proceeds upon the theory that the sheriff levied the execution upon the property of the appellant company, which was not the judgment defendant. Of course, if this were true the sale would be void. If the appellant company agreed to pay the debts of its predecessor, this might be a good reason why Abbott would have been entitled to a judgment against it, but it would not authorize a levy upon its property on a judgment and execution against another corporation.

No cross-action or other pleading than the general denial would be necessary in such a case to avoid the sale. It would be void in itself and would confer no title upon the purchaser. If, however, the appellant company was the same as the execution defendant, or if there was a consolidation of the two corporations under

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the name of the appellant company, and the latter superseded the old corporation, assuming all its liabilities and succeeding to all its rights and privileges, a judgment and execution against the old corporation would bind the personal property of the new. *Indianapolis, etc., R. R. Co. v. Jones*, 29 Ind. 465; *Cashman v. Brownlee*, 128 Ind. 266; *Louisville, etc., R. R. Co. v. Summers, Admr.*, 131 Ind. 241; *Louisville, etc., R. R. Co. v. Utz, Admr.*, 133 Ind. 265.

Under the issues, it devolved upon the appellee to prove his title to the property by a preponderance of the evidence. The evidence disclosed that the Illinois and Indiana Stone and Coal Manufacturing Company was indebted to one Samuel Abbott, for labor, in the sum of \$61.61, for which he obtained a judgment against said company, in the Fountain Circuit Court, October 8, 1892, including interest, penalty and attorney's fees, in the sum of \$141.61, and costs taxed at \$18.20. On this judgment Abbott sued out an execution on October 17, 1892, directed to the sheriff of Vermillion county, who levied the same on 110 acres of land in said county belonging to the judgment defendant, which was sufficient in value to satisfy the judgment. The sheriff made two attempts to sell this property, but received no bidders, and the execution was returned unsatisfied.

In March, 1892, the Shipman Coal Mining and Manufacturing Company, one of the appellants herein, was organized under the laws of the State of Michigan, and there was evidence tending to show that its organization was for the purpose of succeeding the Illinois and Indiana Stone and Coal Manufacturing and Improvement Company, and to continue its business and succeed to its rights and liabilities, but there was no evidence that there was any consolidation of the two companies, nor was there any dispute that the two companies are dis-

inct and separate corporations, although it was a disputed fact whether or not both companies were composed of the same stockholders.

Shortly after the organization of the appellant company it purchased of the old company all its property, including that in controversy, and took possession of the same, and has had possession thereof ever since, except as ousted by the sheriff's levy hereinafter mentioned, the consideration of the transfer being the agreement to pay all the debts of the old corporation amounting to about \$80,000, and the actual payment thereof, except the debt of said Abbott, which in some way was overlooked or failed to be paid. On September 7, 1893, and after the organization of the appellant company and the transfer of such property, the said Abbott caused an execution to be issued on said judgment to the sheriff of Fountain county, who levied the same on the property in controversy on October 13, 1893, and advertised the property to be sold. We shall not undertake to enumerate the many irregularities which it is claimed attended the sale. Within thirty minutes after the hour when the sale was advertised to begin the appellee bought in the entire property for the price of \$30, the value of which he now places at \$325, and this is also the value fixed by the court upon the property, although there was evidence varying from \$200 to \$3,000.

The appellee did not take the property into possession after he had bidden the same in at the sale, nor did he pay the purchase-price for some hours afterwards, and before the appellant company had offered to the sheriff to pay the whole amount of said judgment, interest and cost, although no actual tender was made at the time.

The evidence further shows that subsequently the appellants offered to the appellee the amount of his purchase, together with a liberal compensation for his time,

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trouble, and expense, which he refused to take. The sheriff accepted the money to satisfy the judgment, except the \$30 for which the property was sold to the appellee. Prior to the beginning of this action the appellant company made a formal tender to the appellee of \$55 in gold coin, and kept the same in hand for him until suit was brought, and then paid it into court for the use of the appellee, where it still remains.

We do not see how, under this evidence, the finding and judgment of the court can be upheld. As we have seen, there was no evidence of a consolidation of the two corporations or of a merger of the old into the new. The one corporation was organized under the laws of the State of Michigan. It is not shown in what State the other had its existence. The levy upon the property of the appellant corporation and all the subsequent proceedings thereunder were void, and the sale conferred no title whatever upon the appellee.

The appellants were entitled to a new trial.

Judgment reversed.

Filed Jan. 8, 1895.

No. 1,372.

NELSON, ADMINISTRATOR, v. SPAULDING.

HUSBAND AND WIFE.—*Liability of Husband for Wife's Necessaries.*—

Liability of Wife.—*Presumption.*—Where articles furnished to the wife are necessities which the law obligates the husband to furnish, and for the procurement of which she may pledge his credit, the law does not imply a promise on the wife's part to pay therefor, and in order to bind her they must have been furnished on her credit, coupled with a promise on her part to pay therefor.

SAME.—*Special Promise of Wife to Pay for Necessaries Furnished Her.*—

That the evidence is sufficient to uphold the finding of a special promise by the wife to pay therefor, see opinion.

DAMAGES.—*Excessive.*—That the damages were excessive, see opinion.

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From the Ohio Circuit Court.

- *J. B. Coles and G. B. Hall*, for appellant.
D. S. Wilber, for appellee.

Ross, C. J.—This appeal is from a judgment rendered against the estate of Henrietta Peaslee, deceased, upon an account for medicines furnished and professional services rendered decedent by appellee.

The overruling of appellant's motion for a new trial is the only error assigned in this court.

Counsel for appellant insist that the finding of the court is not sustained by sufficient evidence; that the evidence shows that at the time the medicines were furnished and services rendered, the decedent was a married woman; that appellee charged the items of the account on his books to decedent's husband, and further, that the evidence fails to establish that decedent expressly agreed to pay appellee, upon the faith of which the goods were furnished and the services rendered.

- Under the common law, a husband is bound to support and maintain his wife, providing her with necessary lodging, clothes and subsistence; and, in case of sickness, furnish her with medicines and medical attendance, and we know of no provision of our statute which relieves him from this obligation. Because the husband fails to make proper provision for his wife's support and comfort, does not compel her to suffer for want thereof, for she may pledge his credit and procure necessities, and he is liable therefor.

At common law, the wife could make no contracts without the consent of her husband, which would bind her separate estate, but in this State her disabilities have been removed, and she may contract with reference to her separate estate without her husband joining. Section 6960, R. S. 1894.

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So she may contract for the necessities which her husband is bound to furnish her, and if she promised to pay for the same, and they were furnished upon her credit, she is liable therefor.

It is not claimed by counsel for appellee that decedent's husband was not bound to furnish her the medicines and attention embraced in the account, but that she having received them, the law implies a promise on her part to pay therefor. Such would be the rule were the items of the account for things which the husband is not bound to furnish for the support and maintenance of the wife, but when the goods are the necessities which the law obligates him to furnish, and for the procurement of which she may pledge his credit, no such presumption arises, and in order to bind her they must have been furnished on her credit, coupled with a promise on her part to pay therefor.

The serious question that presents itself for our decision is, whether or not there is any evidence to establish a promise on the part of the decedent to pay appellee, and we are free to confess that we are not without misgivings in concluding that there is evidence to sustain such a finding. Considering together, however, the evidence of the witnesses Elizabeth Riggs and John H. O'Neal, sister and brother of the deceased, wherein the former testified that decedent told appellee "that she wanted him paid," and the latter that he "heard her say that she would pay the doctor," we must hold that there is evidence to sustain the court's finding that the decedent promised to pay appellee.

It is next urged that the damages assessed are excessive. In this contention we must concur. It is undisputed that decedent paid appellee twenty-five dollars which the witness testified "covered the charge for amputation of the toe." The charge in the account for the

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amputation is ten dollars, and each of the witnesses who testified on that subject testified that that was what the services were worth, hence to that amount the assessment is excessive.

It is therefore ordered that the appellee remit ten dollars of his judgment within thirty days from this day, in which event the judgment, when so reduced, is affirmed, at the cost of appellee. But if appellee shall fail to remit ten dollars of said judgment within the time above stated, the judgment of the court below is reversed, with instructions to grant a new trial.

Filed Dec. 11, 1894; remit Jan. 8, 1895.

No. 1,421.

GOFF v. HANKINS.

MARRIED WOMAN.—*Statute Construed.*—The different sections of the statute declaratory of the rights of married women, and for their protection, must all be construed together.

SAME.—*Suretyship.*—Whenever the result of a transaction is such as to impose upon the wife's property a liability to answer for the debt of another, she must be regarded as the surety and entitled to the protection of the statute, whether she be a party to any written contract or not.

SAME.—*Suretyship.*—*Real Estate.*—*Personal Property.*—*Mortgage.*—*Pledge.*—There is no difference in principle, between a mortgage of her real estate and a mortgage or pledge on her personal property.

SAME.—*Suretyship.*—*Separate Property.*—*Mortgage.*—*Pledge.*—Whenever a married woman either pledges or mortgages her separate property to secure the debt of another, she occupies the position of a surety within the statute.

INTERROGATORIES TO JURY:—*Judgment on Answers to.*—*Scope of Consideration.*—*Evidence.*—In determining the right of a party to judgment upon answers to interrogatories the court will not consider what evidence was introduced on the trial, but simply what might have been properly offered under the issues.

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ESTOPPEL.—*Married Woman*.—There can be no element of estoppel as to a married woman where all the parties are fully conversant with her rights in the matter in controversy.

From the Blackford Circuit Court.

J. H. C. Smith, A. L. Sharpe and J. A. Hindman, for appellant.

E. L. Watson, L. Mock and A. Simmons, for appellee.

GAVIN, J.—Section 5115, R. S. 1881, being section 6960, R. S. 1894, reads as follows:

“All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided.”

By section 5117, R. S. 1881, section 6962, R. S. 1894, it is provided that a married woman may acquire and hold real and personal property, and the same with its proceeds shall be under her control the same as though she were unmarried. “And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: Provided, however, That she shall be bound by an estoppel *in pais* like any other person.”

Section 5119, R. S. 1881 (section 6954, R. S. 1894), is: “A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void.”

Under these statutes ability is the rule and disability to contract, on the part of a married woman, is the ex-

ception. *Arnold v. Engleman*, 103 Ind. 512; *Cummings v. Martin*, 128 Ind. 20.

It is earnestly contended by counsel for the appellant that section 5119, *supra*, can not and ought not to be construed as a limitation upon the power expressly conferred by section 5117, *supra*, "to make any contracts" with reference to her personal property. Counsel would apply the inhibition simply to her contracts with reference to her real estate. We can not regard this as a fair construction of the statute.

These sections are all parts of one act passed for the relief and protection of married women, and they are to be liberally construed to effectuate the purpose intended. *Long v. Crosson*, 119 Ind. 3.

The different sections must all be construed together, and when this is done we have no doubt that the plain intent of the legislature was to prohibit every contract of suretyship in any form whatever, whether it operated upon the real or personal property of the married woman.

In *Johnson v. Jouchert*, 124 Ind. 105, it is also said: "A married woman, by force of section 5119, is protected, as at common law, in all transactions which do not relate to or benefit her separate estate, or business, or which are not to her personal benefit."

Without the provisions of section 5119, *supra*, the wife could mortgage her realty, as well as her personalty, to secure a surety obligation. We can see no good reason for limiting the inhibition to real estate. There is in the section itself no such limitation.

In this case appellee recovered an organ which had been delivered by her as a pledge to secure a debt of her husband's, and an instrument was executed by the appellant and husband showing that the organ was received as security for part payment of a team of horses sold by appellant to the husband, with a right of redemption

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up to a certain date, and if not so redeemed, the organ to become the absolute property of appellant at his option.

It is strenuously argued by counsel that because this instrument was not signed by appellee nor any personal obligation assumed by her to pay the debt, no liability of suretyship was created. The transaction was clearly (upon appellee's version at least, and this the jury accepted) a pledge of her property to secure her husband's debt. Whenever the result of the transaction is such as to impose upon the wife's property a liability to answer for the debt of another, she must be regarded as a surety and entitled to the protection of the statute, whether she be a party to any written contract or not. There is no difference in principle between a mortgage of her real estate and a mortgage or pledge on her personal property.

Whenever a married woman either pledges or mortgages her separate property to secure the debt of another, she occupies the position of a surety within the statute. *Davee v. State, ex rel.*, 7 Ind. App. 71; *Trentman v. Eldridge*, 98 Ind. 525 (534); *Johnson v. Jouchert, supra*; *Wolf v. Zimmerman*, 127 Ind. 486; *Brandt Suretyship*, section 22.

In order to overthrow the general verdict the answers to special interrogatories must be absolutely irreconcilable with the general verdict. *Pottlitzer v. Wesson*, 8 Ind. App. 472; *Grand Rapids, etc., R. W. Co. v. Cox*, 8 Ind. App. 29.

There is here no such inconsistency as would prevent both from standing together. It may be true that the only demand made was in writing, and that no written demand was offered in evidence, and yet it may also be true that the contents of the written demand were proved by parol. In determining the right of a party to judgment upon the interrogatories, we do not consider what

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evidence was introduced on the trial, but simply what might have been properly offered under the issues. *Shoner v. Pennsylvania Co.*, 130 Ind. 170.

While there is some conflict in the evidence as to the nature of the arrangement concerning the organ, there is abundant evidence to justify the jury in finding, as they did, that the organ was simply pledged as security for the husband's debts.

There is here no element of estoppel, because there is evidence that the appellant was fully conversant with all the facts relating to the rights of appellee. Under such circumstances there can be no estoppel. *Wolf v. Zimmerman, supra*; *Voreis v. Nussbaum*, 131 Ind. 267.

We find no good cause for reversal.

Judgment affirmed.

Filed Jan. 8, 1895.

No. 1,515.

MOON, TRUSTEE, v. CLINE.

APPEAL.—*Rendering Judgment Prior to Filing Motion for New Trial.*—

When Year for Appeal Begins to Run.—Although a judgment is rendered prior to the filing of a motion for a new trial, the filing of the motion within the time designated by the statute operates to hold the judgment in abeyance, and the year allowed for taking an appeal does not run from the date of the rendition of the judgment, but from the date of the ruling on such motion.

SAME.—*Assignment of Errors by one not a Party to the Judgment Appealed From.*—*Civil Township.*—*Township Trustee.*—Where the judgment appealed from was rendered against "Union Township, in Union county, Indiana," but the assignment of errors, on appeal, simply designates the appellant as being "Milton J. Moon, trustee," the errors present no question, as the party assigning errors is not a party to the judgment appealed from.

From the Union Circuit Court.

Moon, Trustee, v. Cline.

T. D. Evans, for appellant.

J. W. Connaway and *L. H. Stanford*, for appellee.

Ross, C. J.—The appellee, as plaintiff below, brought this action against Union township, Union county, Indiana, to recover upon a note alleged to have been executed by said township through its trustee April 12, 1877, for money borrowed to pay indebtedness incurred in its ordinary and necessary business affairs as a political and civil corporation.

Upon issues joined, the cause was tried by the court, and at the request of the defendant a special finding of the facts made with conclusions of law thereon. A motion for a new trial was filed by the defendant and judgment rendered in favor of the appellee against said Union township, Union county, Indiana.

The appellant assigns in this court the following errors, viz:

1. "The complaint does not state facts sufficient to constitute a cause of action.
2. "The court erred in overruling the appellant's demurrer to the complaint.
3. "The court erred in sustaining the appellee's demurrer to the third paragraph of the appellant's answer.
4. "The court erred in sustaining the appellee's demurrer to the seventh paragraph of appellant's answer.
5. "The court erred in sustaining the appellee's demurrer to the eighth paragraph of the appellant's answer.
6. "The court erred in its conclusions of law on the special finding of the facts.
7. "The court erred in overruling the appellant's motion for a new trial."

The appellee insists that under the assignment of errors and the record in this cause, no questions are pre-

sented for our consideration, for the reasons: First, "Because the assignment of errors is not made in the name of the proper party as appellant"; second, "Because the certificate to the transcript is insufficient," and, third, "The appeal was not taken within one year from the rendition of the judgment."

The record discloses that on the 19th day of November, 1892, the same being the last day of the October term of the Union Circuit Court, the court made its finding and at once rendered judgment thereon. On the 16th day of January, 1893, the same being the first day of the succeeding or January term of said court, the defendant filed its motion and causes for a new trial, which motion was overruled by the court on the 27th day of January, 1893. The record in this cause was filed with the clerk of this court November 23, 1893.

The statute, section 570, R. S. 1894, provides that if the verdict of the jury is returned or the decision of the court made on the last day of the term, the parties shall have until the first day of the next term to file their motion and causes for a new trial. *Wallace v. Ransdell*, 90 Ind. 173; *American White Bronze Co. v. Clark*, 123 Ind. 230.

Although a judgment is rendered prior to the filing of a motion for a new trial, the filing of the motion within the time designated by the statute operates to hold it in abeyance and the year allowed for taking an appeal does not run from the date of the rendition of the judgment, but from the date of the ruling on such motion. *Wheeler v. Barr*, 6 Ind. App. 530.

This appeal was perfected within the time allowed by section 645, R. S. 1894.

An appeal can be taken from the circuit court to this court only by the parties to the judgment appealed from. Section 644, R. S. 1894.

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The assignment of errors is the appellant's complaint, and if the record fails to show a judgment rendered against the appellant, there is nothing upon which to predicate his assignment. The judgment in this case was rendered against "Union township, in Union county, in the State of Indiana," and the trustee of said township is ordered to pay said judgment, but the assignment of errors simply designates the appellant as being Milton J. Moon, trustee. This is not sufficient under the rulings of the Supreme Court. *Braden v. Leibenguth, Tr.*, 126 Ind. 336, and cases cited.

The certificate of the clerk attached to the record before us states: "That the above and foregoing is a true and complete copy of the proceedings and judgment of said court in the above entitled cause as the same appears on record in my office."

We look to the certificate of the clerk to ascertain what is properly in the record, for if the record contains things not properly embraced within the clerk's certificate they are without authentication and can not be considered. In the case of *Reid v. Houston*, 49 Ind. 181, the court, in passing upon the sufficiency of a certificate under section 4 of the act of January 7, 1852, 2 G. & H. 13 (section 7932, R. S. 1894), attached to a transcript, says: "The form of the certificate should be, omitting the formal parts, that the above and foregoing contains complete copies of all the papers and entries in said cause."

If, however, the certificate purports to authenticate all that the record contains, but is informal or indefinite, a motion to dismiss on account thereof must be made before the cause is submitted in order to avail. *Cooper v. Cooper*, 86 Ind. 75; *Walker v. Hill*, 111 Ind. 223.

Counsel's objection to the sufficiency of the complaint is untenable. The complaint does, as we think, proceed

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upon a definite theory, namely, the note set out therein. As an action upon a promissory note, the complaint is sufficient.

The six years' statute of limitations is not good as an answer to an action on a promissory note, hence the court did not err in sustaining the demurrer to the third paragraph of answer.

Neither was it error to sustain the demurrers to the seventh and eighth paragraphs of answer, as neither one of them stated a defense to the appellee's cause of action.

As heretofore stated, the appellant was not a party to the judgment appealed from, the judgment having been rendered against "Union township, in Union county, in the State of Indiana." Union township, the judgment defendant, is not a party appellant to this appeal, except we can say that the appellant, by denominating himself as Milton J. Moon, trustee, is sufficient for that purpose. The judgment being against Union township, the appeal must be taken by it, and it designated as the appellant. Whether the trustee of Union township could appeal from said judgment and in the assignment of errors in this court designate himself as such trustee is not before us for the reason that there is nothing in the assignment of errors to indicate that "Milton J. Moon, trustee," is the trustee of Union township. Milton J. Moon has nothing to complain of so far as the record discloses, and if he does not appear here as the representative of Union township, has nothing upon which to predicate the errors assigned. The assignment does not show him to be the trustee of Union township in Union county, Indiana.

Judgment affirmed.

Filed Jan. 9, 1895.

Huggins, Administrator, v. Hughes.

No. 1,312.

HUGGINS, ADMINISTRATOR, v. HUGHES.

PRACTICE.—*Motion to Strike Out Pleading.*—*Bill of Exceptions.*—*Order of Court.*—A motion to strike out a pleading, with the rulings of the court thereon, can be shown only by a bill of exceptions or by special order of court.

APPELLATE COURT PRACTICE.—*Weight of Evidence.*—*Verdict.*—*Parties in Family Relation.*—*Law and Fact.*—The court will not disturb a verdict upon the weight of the evidence bearing upon the question of promise to pay for services by parties standing in the family relation, where the existence of such promise is a question of fact for the jury.

ASSIGNMENT OF ERRORS.—*Motion to Strike Out Pleading.*—*How Assigned.*—A ruling of the court on a motion to strike out a pleading must be separately assigned as error, and not as a ground for a new trial, and must be presented by bill of exceptions or special order of court.

EVIDENCE.—*Exclusion of Testimony.*—*Question, How Saved.*—The exclusion of testimony can only be made available error by asking some pertinent question of the witness, and, if objected to, stating to the court what testimony the witness would give in answer to the question proposed.

From the Blackford Circuit Court.

B. G. Shinn and E. Pierce, for appellant.

J. Cantwell and S. W. Cantwell, for appellee.

LOTZ, J.—The appellee filed a claim against the estate of Sarah Huggins, deceased, which the appellant, as administrator, refused to allow. The claim was for services rendered in building fence and for boarding, lodging and caring for the said Sarah a number of years prior to her death and during her last sickness.

The administrator filed an answer in three paragraphs, the first being the general denial, the second a set-off, alleging an indebtedness of the appellee to the deceased for rent of farm and for pasture, the third being the statute of limitations.

The appellee replied in four paragraphs. The appellant moved to strike out the fourth paragraph of reply, which motion was overruled. The issues joined were submitted to a jury, which returned a general verdict for appellee in the sum of \$558.87, on which judgment was rendered.

The first error assigned is the overruling of the motion to strike out the fourth paragraph of reply.

A motion to strike out a pleading with the rulings of the court thereon, can be shown only by a bill of exceptions or by special order of court. *Indiana Mfg. Co. v. Millican, Admr.*, 87 Ind. 87.

The exception to the ruling of the court in this case is not presented by either of these methods. Consequently this assignment does not present anything for our consideration.

The only other error assigned is the overruling of the motion for a new trial.

It was insisted in the court below, and it is also contended here, that the verdict is not supported by sufficient evidence and is contrary to the law, and that the amount of the recovery is erroneous, being too large.

There was evidence which tended to prove that appellant's decedent lived in the family of the appellee as a member thereof. From this fact the appellant invokes the familiar rule that where persons live together as members of the same household, no obligation to pay arises for services performed by one for the other, or for boarding or lodging furnished, except upon proof of a promise to pay therefor. Conceding the correctness of this rule, we think there was evidence from which the jury was warranted in finding a promise to pay on the part of the deceased.

This court will not disturb a verdict upon the weight of the evidence bearing upon the question of a promise,

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for the existence of such promise is a question of fact peculiarly within the province of the jury. *Forester v. Forester*, 10 Ind. App. 680; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280. There was also evidence which tended to sustain the full amount of the verdict.

This court has no right to order a remittitur or a new trial under such circumstances.

It was assigned as a cause for a new trial, that the court erred in overruling the appellant's motion to strike out the fourth paragraph of the reply.

The ruling on the motion to strike out was not an error occurring at the trial, but if error at all, it preceded the trial. The granting of a new trial would not correct such error, for it would still remain in the record of the proceedings. Such rulings must be separately assigned as error and must be presented by bill of exceptions, or by special order of the court. *Ringgenberg v. Hartman*, 102 Ind. 537; *Cates v. Thayer*, 93 Ind. 156; *Reed v. Spayde*, 56 Ind. 394.

It was also assigned as a cause for a new trial, that the court erred in excluding certain evidence offered by the appellant of the fact that his decedent performed work and labor for the appellee while boarding in his family.

The record shows that the appellant called upon the witness stand as a witness in his behalf one Savannah Huggins, and propounded to her this question: "You may state what the fact is at the time you were there at the house of your mother-in-law during the time about which you have testified since John W. Hughes (appellee) lived there, as to whether the old lady (the decedent) was engaged in the performance of any work and labor about the house and in the family." An objection was sustained to this question, to which ruling the appellant excepted. The appellant made no statement to the court as to what the witness would testify to in answer to the

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question. "The exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and if objection is made, stating to the court what testimony the witness would give in answer to the question proposed." *Higham v. Vanosdol*, 101 Ind. 160 (163); *Kern v. Bridwell*, 119 Ind. 226; *Chicago, etc., R. W. Co. v. De Baum*, 2 Ind. App. 281.

We find no reversible error in the record.

Judgment affirmed.

Filed Jan. 9, 1895.

No. 1,393.

SMITH ET AL. v. MEISER, GUARDIAN.

EVIDENCE.—Admissions.—Vendor and Vendee.—Sale.—In an action by the guardian of remaindermen against the life tenant and others for saw logs alleged to have been sold by the life tenant, it was not error to admit evidence of admission of the alleged sale, by the alleged purchaser, who was also a party defendant, made in the absence of the vendor.

SAME.—Limitation of Application.—Instruction to Jury.—If the vendor desires to have such evidence limited as affecting only the purchaser, he should have asked the court to instruct the jury to that effect.

SAME.—Vendor and Vendee.—Sale.—Privity in Design.—To make such evidence competent, as affecting the purchaser, it was not necessary to show that he and the vendor had a joint interest or privity in design.

SAME.—Immaterial.—Harmless Error.—Evidence of the sales of other timber, ten years previous to that in controversy, was immaterial and harmless.

SAME.—Irrelevant to Issues.—Harmless Error.—Evidence which is irrelevant to the issue and could not have prejudiced the defendant in any event, is harmless.

From the Allen Circuit Court.

H. C. Hanna, for appellants.

L. M. Ninde and H. W. Ninde, for appellee.

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REINHARD, J.—This action was brought by the appellee, as guardian, to recover certain saw logs alleged to have been cut from land in which the appellant owned a life estate, and the appellee's wards a remainder. The land is a farm upon which appellants reside, a small portion of which was reserved for timber. On this reserved land there were some valuable trees which it was necessary to save for the purpose of keeping the place in proper repairs. The complaint averred that the saw logs in controversy were cut for merchandise and not to improve the estate. The appellants admitted cutting the timber, but claimed that it was cut to make necessary repairs on the farm. To prove that the timber was to be used for merchandise, it was proposed to be shown by the appellees that it had actually been sold to one Pence, who was also a party defendant to the action. Pence owned a saw mill in the neighborhood, and it was claimed that he was hauling the logs to his mill at the time this action was brought.

The appellee offered evidence that Pence admitted that he had purchased the logs of the appellants. To this there was an objection by the appellants upon the ground that they were not present when the admission was made, and that it was, therefore, not competent against them. The court overruled the objection, and the appellants excepted. There was no error in this ruling. The evidence was competent to bind Pence who was a party defendant. If the appellants desired to have the evidence limited as affecting only the defendant Pence they should have asked the court for an instruction to the jury that the evidence could not be considered against the appellants, or to limit its applicability to the defendant Pence at the time it was admitted. Appellants insist that Pence was only a nominal defendant who neither answered nor was defaulted at the trial. In this the counsel for appellants

are in error. The record shows that a joint answer was filed by all the defendants, including Pence.

It is true that counsel for appellee remarked when offering the testimony of one of the witnesses regarding the admissions of Pence, that he introduced it against all the defendants, but it is not shown that the court so admitted it, and it does not appear that the appellants asked to have the consideration of the evidence limited as an admission against Pence alone. To make the evidence competent as affecting Pence, it was not necessary to show that Pence and the appellants had a "joint interest of privity in design," as insisted by the appellant's learned counsel. If the evidence was competent as against Pence, which we think it was, no error was committed in overruling the objection to its introduction.

The court permitted the appellee to prove that timber had been taken off the premises some ten years before the time of the trial. If this was technically erroneous, it is not apparent how it could have harmed the appellants. There was no dispute that the appellants took the timber in controversy, and the only question in controversy before the jury was whether the timber so taken was taken for necessary improvements on the premises, or to be sold as merchandise. We can not see how the fact that timber had been cut ten years before could in any way have influenced the jury in the determination of the real question in issue before them.

Walter Shane, a witness for the appellee, and a farmer who was acquainted with the premises, was asked to tell the jury if there was enough material in the fences on the place, if it had been handled properly, to make a good fence, to which, without any objection, he answered "yes." Subsequently he was again asked, after he had testified that he had been a farmer all his life, and made fences and knew what a good fence was, and

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the different kinds of fences used by farmers, whether, at the time the logs in suit were cut, there was timber and material enough in the fences on the farm to have made a good farmer's fence. The question was objected to, and it does not appear to have been answered. The same question in substance was afterwards repeated, and over the appellant's objection that the witness was not qualified to express an opinion, and that the testimony was "immaterial and improper," the witness was permitted to answer and did answer in the affirmative.

We do not think there was any error in this ruling. So far as the qualifications of the witness are concerned, they were sufficiently shown by his previous testimony. It was not improper to ask the witness whether there was or was not sufficient material to make the fencing without cutting timber. Besides, the theory of appellee's case was, not that the timber was used or intended for use in the fences, but that it was cut to be sold and was sold. If this was not shown, the appellee had no case, and the opinion of the witness as to the sufficiency of the material in the fences could have had no effect upon the question whether the timber was taken for market. The testimony could not have harmed the appellants, in any event. What has just been said applies also to the testimony of the witness Bates, who was asked similar questions and permitted to answer them. There is no reversible error in the record.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,344.

LOWE v. GUARD ET AL.

PARTITION FENCE.—*Right to Construct.*—*Liability for Injury to Stock While in Process of Construction.*—*Negligence.*—An adjoining land-owner has the right to construct a fence on the partition line, subject to agreement and legal conditions, but he must use due care in its erection and leave it in a reasonably safe condition when completed, or respond in damages for injuries to stock of another lawfully pasturing in adjoining premises to his, resulting from such negligence in constructing or defective condition after construction, in the absence of contributory negligence on the part of the complaining party.

From the Dearborn Circuit Court.

G. M. Roberts and *C. W. Stapp*, for appellant.

M. J. Givan and *M. S. Givan*, for appellees.

Ross, C. J.—This action was brought by the appellant to recover damages for injury to his stock which, he alleged, wandered upon the line dividing his land from that occupied by the appellees, and became entangled in barbed wires then being used by appellees in the construction of a fence on said division line. The complaint is in three paragraphs, to each of which demurrers were filed and sustained, and these rulings of the court are the errors assigned in this court.

The paragraphs are similar in their general allegations, the only material difference being in that they seek to recover for injuries sustained at three separate and distinct times.

The material allegations of the first paragraph of the complaint are in substance as follows: "That on the 2d day of October, 1892, the defendants (appellees) were in possession of a tract of land adjoining the land owned by plaintiff, in Lawrenceburg township, Dearborn county, Indiana;" that they undertook the erection of a barbed

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wire fence on the line dividing their land from plaintiff's, and, "in the process of the erection of said fence, carelessly and negligently strung and laid upon the ground, and on the line of such proposed line of fence, and, preparatory to stringing the same on the posts, three or more barbed wires, with sharp and jagged barbs projecting from each of said wires, throughout their entire length, at spaces of six inches, and carelessly and negligently allowed said barbed wire to remain lying on the ground at said point, without any guard or protection to prevent the stock from said adjoining pasture fields from coming in contact therewith, and in said condition said wires were negligently and carelessly, temporarily abandoned by defendants," without guards, etc. That plaintiff's stock, including a horse, was pasturing in his field adjoining the defendant's land, and between which the fence was being erected; that the defendants knew plaintiff was so pasturing his stock, and that plaintiff had no knowledge of the defendants building said fence, but, that without fault on his part, his said horse wandered over to and became entangled in the barbed wires so placed on the ground by the defendants, whereby its legs were cut, etc., to plaintiff's damage, etc.

It is very earnestly insisted by the appellee that neither paragraph of the complaint states a cause of action; that the facts alleged affirmatively show that the plaintiff was guilty of contributory negligence in permitting his stock to wander over to and become entangled in the wires. It is true that under the common law the owner of the stock is bound to keep them within his own inclosure, in other words, to keep them on his own premises, and if he suffers them to escape and go upon the lands of another, he must answer in damages. The *Pittsburgh, etc., R. W. Co. v. Stuart*, 71 Ind. 500, and cases cited. The common law is still in force in this

State, except in so far as it is changed by section 6564 *et seq.*, R. S. 1894, which makes special provision for the erection and maintenance of partition fences. Under these provisions it is the duty of the adjoining land-owners jointly to build and maintain partition fences. They may, however, by special agreement divide and set apart to each the portion which each is to build and maintain. When thus partitioned, each is answerable for the condition of that part set off to him. And provision is made that when one party fails to maintain his part of such fence, the other party may do so for him and recover therefor.

The right of the appellees to build a fence on the dividing line is not questioned, hence that right carried with it an exemption from liability while erecting it, provided they used due care in its erection and left it in a reasonably safe condition when completed. A lawful act may be done in such a negligent manner that if injury results an action will lie. On the contrary, the doing of an unlawful act does not always create a liability.

In this case the building of the fence was lawful, but the appellees had no right to be negligent in the manner of its construction or to leave it in an unsafe condition when completed. If, by reason of their negligence, appellant's stock was injured without fault on his part contributing thereto, they must answer therefor. •

A complaint very similar to that under consideration was held good in the case of *McFarland v. Swihart*, 11 Ind. App. 175. The opinion in that case is fully sustained by *Sisk v. Crump*, 112 Ind. 504.

While we may not approve all that is said by the court in the case of *Sisk v. Crump*, *supra*, it stands as the law in this State until overruled by the Supreme Court.

Following these authorities we must hold each para-

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graph of the complaint in the case under consideration, to be sufficient to withstand a demurrer for want of facts.

Judgment reversed, with instruction to the court below to overrule the demurrers to each paragraph of the complaint.

Filed Jan. 16, 1895.

No. 1,339.

BURKE ET AL. v. GARDNER.

JUDGMENT.—*On Answers to Interrogatories.—When Reversible Error.—*

It is reversible error to refuse to render judgment on the general verdict where the answers to interrogatories are not sufficient to overthrow the general verdict.

From the Knox Circuit Court.

O. H. Cobb, for appellants.

Lotz, J.—The appellee, as a creditor of the estate of John Newcomb, deceased, brought this action against the appellants as administrators *de son tort*, charging them with having converted a large amount of personal property belonging to said estate to their own use. The appellants filed an answer in denial and also special answers, in which they alleged that they took possession of the property on account of the breach of the conditions of a chattel mortgage executed by Newcomb in his lifetime.

The issues joined were tried by a jury, which returned a general verdict for appellants. The jury also returned answers to interrogatories, from which it appears that the property had been removed from Knox county, Indiana, to the State of Illinois, without the consent of the appellants; that the property taken possession of by the

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appellants was of the value of \$338, and that the appellants took possession of logs of the value of \$18, and corn of the value of \$7.50, which were not included in said mortgage.

The appellants moved for a judgment in their favor on the general verdict. This motion was overruled, and the court rendered judgment on the special findings in favor of the appellee in the sum of \$28.05, being the value of the logs and corn, with ten per centum thereon.

The overruling of the motion for judgment on the general verdict is one of the errors assigned.

The general verdict must control unless it affirmatively appears that the facts specially found are irreconcilably in conflict with it. *Evansville, etc., R. R. Co. v. Marohn*, 6 Ind. App. 646.

Before the appellee was entitled to a judgment, he was bound to prove, and the jury was required to find, that he was a creditor of the estate of John Newcomb, deceased, and that the property converted by the administrators *de son tort* was such property as the creditor had the right to have placed in the hands of an administrator to make assets for the payment of debts. *Kahn v. Tinder*, 77 Ind. 147; *Goff v. Cook*, 73 Ind. 351; *McCoy v. Payne*, 68 Ind. 327; *Ferguson v. Barnes*, 58 Ind. 169.

The general verdict in favor of the appellants, under the issues joined, carried with it the necessary inference that they were not creditors of the estate of John Newcomb. There is nothing in the answers to the interrogatories that indicates or even tends to show that the appellee was a creditor. The most that can be said for them is that they show that the appellants were indebted to the estate.

The evidence is not in the record, but if it were we

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could not look to it to aid us in determining the question before us. *Cox v. Ratcliffe*, 105 Ind. 374.

The special findings were insufficient to support a judgment for the appellee, nor are they sufficient to override the general verdict.

For the error in overruling the motion for judgment on the general verdict, the cause must be reversed.

Judgment reversed, with instructions for further proceedings in accordance with this opinion.

Filed Jan. 8, 1895.

No. 1,427.

ALBANY LAND COMPANY v. McELWAIN-RICHARDS COMPANY.

JUDGMENT.—*By Default.*—*Application to Set Aside Default.*—*Notice.*—

When an application is made during the term at which the judgment by default was taken, the proper proceeding is by motion without notice. But if made after the term, the application is a new proceeding in the nature of a complaint, and requires notice. However, notice can not be insisted on as a prerequisite where there is an appearance and demurrer.

SAME.—*By Default.*—*Application to Set Aside.*—*When may be Made.*—

The defendant could have asked and obtained leave at the same term of court to file an amended complaint or application to set aside the default, and had the cause been continued till the next term he could have filed an amended complaint then. But the judgment by which the court overruled the application was a final determination of the question; and such ruling remained *in fieri* only during such term, unless the cause was postponed until next term.

PRACTICE.—*Motion to Strike out Motion.*—*Effect.*—A motion to strike out another motion, if sustained, would be equivalent to overruling the first motion.

From the Marion County Superior Court.

J. W. Holtzman and *J. M. Leathers*, for appellant.

H. J. Milligan, for appellee.

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REINHARD, J.—On the 2d day of December, 1893, being the 24th judicial day of the special term of the Marion Superior Court for the month of November, 1893, the appellee obtained a judgment by default on an open book account against the appellant for \$845.15, summons having been duly issued and served. On the 11th day of December, 1893, being the 7th judicial day of the December term, 1893, of said court, the appellant filed its "motion and application" asking the court to set aside the default and judgment. Subsequently, and during the same term, the appellee filed its demurrer to the application, alleging for cause therefor that the same did not state facts sufficient to constitute a cause of action. No ruling appears to have been made upon the demurrer, but on the 19th day of December, which was during the same term at which the application was filed, the court overruled the motion and application to set aside the default and judgment, to which ruling the appellant excepted and was given twenty days' time to prepare and file a bill of exceptions. On the 2d day of January, 1894, being the 2d judicial day of the January term, 1894, of said court, the appellant filed its amended application to set aside said default and judgment, which was at the same term, and upon appellee's motion, stricken from the files, to which ruling the appellant excepted, and was given thirty days' time to prepare and file a bill of exceptions. From this ruling an appeal was taken to the general term of the superior court, and on the 9th day of February, 1894, which was during the February term, 1894, of said court, the appellant filed its bill of exceptions and also its abstract from the entry docket in the cause and its assignment of errors. The specification of errors is:

1. That the court erred in sustaining the appellee's demurrer to the appellant's motion to set aside the judgment taken by default.

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2. That the court erred in sustaining appellee's motion to strike out appellant's amended motion or application to set aside the judgment taken by default against said appellant.

The appeal having been submitted to the full bench of the superior court at the general term, the judgment of the special term was affirmed, and the appellant excepted. The only error assigned here is that the superior court in general term, erred in affirming the judgment of the special term.

We shall assume, for the purposes of this appeal, that the amended application is sufficient under ordinary circumstances to entitle the appellant to relief from the judgment by default, and that if such amended application was properly before the court, it would have been its duty under the statute to set aside the default. R. S. 1894, section 399 (R. S. 1881, section 396).

Was the amended application properly before the court?

The record shows that the first application was filed at the term subsequent to the one at which the judgment was taken. When the application is made during the term at which the judgment by default was taken, the proper proceeding is by motion without notice. *Frazier v. Williams*, 18 Ind. 416.

If made after the term, the application is a new proceeding in the nature of a complaint, and requires notice. No notice was required in the present case, as there was an appearance and a demurrer. The fact that the pleading was denominated a "motion" or "application," or that it was entitled the same as the original cause, will not change its character, as the courts will look to the substance and not to mere technical matters.

As there was no ruling upon the demurrer, the only question presented is upon the second assignment of

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error. We agree with appellee's counsel that the sustaining of a motion to strike out a motion or pleading is the same as overruling the original motion or pleading, and that the record presents the same questions as if the latter application had been overruled for any cause. *Blemel v. Shattuck*, 133 Ind. 498; *White v. Morgan & Co.*, 119 Ind. 338.

The filing of the complaint to set aside the judgment by default was the commencement of a new cause of action, and this cause remained *in fieri* until it was finally disposed of. If, therefore, final judgment was rendered during the December term, the cause was at an end, and no amended complaint or other pleading could have been subsequently considered.

We think the matter was finally determined, as far as the superior court was concerned therein, at the December term, 1893. The record shows that the application was then overruled, an exception taken, and time granted for filing a bill of exceptions. The appellant could have asked and obtained leave at that term of court to file an amended complaint or application, and had the cause been continued till the next term, it could have filed an amended complaint then. But the judgment by which the court overruled the application was a final determination of the question whether or not the appellant was entitled to have the judgment by default set aside. The ruling remained *in fieri* only during such term, unless there is an affirmative showing that the cause was postponed until the next term, which is not the case. It was an adjudication of the question whether the appellant was entitled to be relieved from the judgment, and no appeal having been taken therefrom, the ruling must be considered as final, and can not be reviewed now. Nor could the appellant subsequently open up the judgment

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overruling the application, by filing either an amended or a new complaint.

Judgment affirmed.

Filed Jan. 9, 1895.

No. 1,044.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAIL-
WAY COMPANY v. HARPER.

REAL ESTATE.—Trespass and Wrongful Appropriation.—Averments as to Ownership.—Where, in a complaint to recover damages for a trespass upon and wrongful appropriation of land, the averments as to ownership show title in the plaintiff, the complaint will withstand a demurrer, although such averments are not as clear and specific as the rules of careful pleading require.

SAME.—Presumption as to Continuance of Ownership.—An averment that the plaintiff was the owner of the land on the 26th of May, and that the wrong complained of occurred on the 28th of the same month, is sufficient to show ownership on the latter day, as ownership and occupancy are presumed to continue until the contrary is made to appear.

SAME.—Railroad.—Street.—Grant of Right of Way by Municipal Authorities.—Damages.—Abutting Owner's Right of Action.—The owner of land abutting on a highway or street is not debarred from recovering damages from a railroad company constructing a track thereon, by the fact that the municipal authorities have granted the company a right of way over such street or highway.

SAME.—Proof as to Quantity of Land Taken.—It is not essential to the maintenance of the action, that the plaintiff should prove the exact width or dimensions of the land appropriated, if it be shown that some land was taken.

SAME.—Duration of Injury.—Inferences by Jury.—Where a railroad company wrongfully appropriates a strip of ground and constructs thereon a side track, the probable duration of the injury may be inferred by the jury from the facts as to the use actually made of the siding and of the land upon which it is constructed.

SAME.—Adverse Possession.—Occupancy by Third Person.—The erection of telegraph poles upon the ground in controversy by another cor-

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poration, which permitted the railroad company to use one of its wires, can not be made the basis of a claim of title or adverse possession by the latter.

SAME.—Assessment of Damages—Special Statute—Remedy by Independent Action.—Where the owner of land acquiesces in the appropriation thereof by a railroad company, he is not bound to proceed under the special statute for the assessment of damages, but may recover in an independent action for the permanent injury sustained.

From the Grant Circuit Court.

N. O. Ross, W. H. Carroll and G. Dean, for appellant.

J. W. Fesler, E. E. Stevenson and J. A. Kersey, for appellee.

REINHARD, J.—The appellee brought this action to recover damages of the appellant for an alleged trespass upon and wrongful appropriation of her land for the purpose of constructing and maintaining a second railroad track upon the portion thereof lying adjacent to the appellant's right of way upon which the first and main track is laid.

The complaint is in two paragraphs, and a general demurrer addressed separately to each paragraph was overruled. This ruling is assigned and relied upon as error. The specific objection urged against the first paragraph is its failure to allege the appellee's ownership of the property described.

The averment upon the question of ownership is not as clear and specific as could be desired in a model pleading, but we think the several averments when construed together are sufficient to withstand the objection mentioned.

It is alleged that the appellant entered upon the land but a very few days before the action was commenced. In the allegation of ownership it is true the present tense is used, which must probably be construed to refer to the time of the commencement of the action, but it is

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further shown in the complaint, that the appellee claimed title and notified appellant thereof, and that she would claim damages the day before the alleged entry. It is also charged that the appellant entered unlawfully and without right, and that the trespass was a continuing one amounting to an appropriation of a right of way in perpetuity. The objection is highly technical in its character, and we do not think it is tenable.

Another objection urged is that the appellee does not aver ownership in the particular portion upon which the track was laid. This objection is equally untenable. After setting forth a specific description of her real estate, she avers that on the said described piece or tract there were three dwelling houses, occupied by her tenants, each of which houses "fronted on an open way twenty feet in width, which then was and had been left open, extending along the south side of said real estate and adjacent to said railroad right of way for the entire distance along said real estate, *and being a part of said real estate,*" etc.

This, we think, sufficiently shows that the strip upon which it is alleged the second track was constructed, was a part of the real estate described, and of which it is averred she is the owner. If the appellant desired a more specific description of the strip alleged to have been appropriated, it should have interposed a motion to require the appellee to make her complaint more definite in this regard.

But if we should conclude that the strip taken was not described with sufficient certainty, this would not render the complaint bad for the reason that it still shows some injury to the remainder of the land upon which the dwelling houses are situated, under the rule that the owner of property is required to use it so as not to injure the property of his neighbor.

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The special verdict being clearly based upon the first paragraph of the complaint, we would not ordinarily be required to consider the objections urged against the second. We think, however, that the second paragraph is sufficient also. It is averred therein that the appellee was the owner and in possession of the property described on the 26th day of May, 1892, and that the grievances complained of occurred on the 28th day of May, 1892. This is a sufficient averment of ownership. It will not be presumed that there was a change of ownership and possession between the two days named. On the contrary, ownership and occupancy are presumed to continue until the opposite is made to appear. Wharton Ev., section 1286. Appellant's contention that this paragraph of complaint shows the strip of land taken to be a street in a city, even if tenable, would not necessarily prove the complaint bad for the sufficient reason that the owner of land abutting on a highway or street is not debarred from recovering damages from a railroad company constructing a track thereon by the fact that the municipal authorities have granted the company a right of way over such street or highway. *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178.

Besides, the owner of the abutting land may have a peculiar interest in the easement in the street, including the right to have the street kept open and free from any obstruction preventing or interfering with his free ingress or egress, such interest being distinct from that of the general public and inhering in the land of which he is the owner. *Decker v. Evansville, etc., R. W. Co.*, 133 Ind. 493.

We think both paragraphs of the complaint were sufficient to withstand the demurrer.

The court sustained a demurrer to appellant's second paragraph of answer. This pleading is drafted upon the

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theory that the track complained of was laid in a street under the authority of a resolution passed by the common council of the city. For the reasons given in ruling upon the sufficiency of the second paragraph of complaint, we think the demurrer was properly sustained.

The overruling of the motion for a new trial is assigned as error, and it is insisted that the verdict is not sustained by sufficient evidence. One of the alleged defects in the evidence is claimed to consist in the insufficiency of the description of appellee's real estate contained in the deed introduced in evidence. The deed was introduced obviously for the purpose of proving title. We think the ownership was sufficiently proved, and that the objection is not tenable. It was not essential to the maintenance of the action, that the appellee should have proved the exact width or dimensions of the land appropriated by the appellant.

If any land was taken, the appellee has the right to recover for such taking, and if she sustained damage to her other land then she is entitled to recover for such damage also. Nor can we say that there was no evidence from which the jury could find that appellee's injury was a permanent one. The mere fact that the so-called second track is only a siding does not conclusively show that such second track is not permanent, nor is the evidence otherwise conclusive upon this point. Besides, the evidence tends to show an obstruction of the ingress and egress over appellee's land, which the jury were amply warranted in finding, was a permanent obstruction. The probable duration of the injury was a proper inference for the jury from the fact of the use the appellant was actually making of the siding and the strip of land upon which it is constructed.

Appellant's counsel also insist that the evidence shows,

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beyond dispute, that the narrow strip of ground upon which the side track was laid was a part of the company's original right of way. This contention is based upon the assumption that the appellant, in the acquisition of such right of way, obtained a strip 100 feet in width, for which assumption there is no warrant, for the reason that there is evidence tending to prove that such right of way is coextensive only with what was known as the old plank road, and that from the center of this road to its outer edge on the north no portion of the strip of land claimed by the appellee is included.

Nor is the appellant's position tenable, that because telegraph poles had been erected and were still standing on the disputed strip, the extent of the right of way must be measured by the locality occupied by such poles. The evidence tends to show that the poles were erected, and, together with the wires connected with the same, are owned by another corporation, which permits the appellant to use one of its lines. No presumption of claim of title, or adverse possession, on the part of appellant, can therefore be properly based upon the erection of these poles.

Without further prolonging the discussion of this branch of the case, it will be sufficient to say that there is some evidence upon every material branch of the issues tending to support the verdict, and that there was consequently no error in the court's refusal to grant a new trial on account of the insufficiency of the evidence.

Nor do we think the verdict so uncertain that the appellant's motion for a *venire de novo* should have been sustained.

The verdict shows that there was a depreciation in the main body of the appellee's land, amounting to \$500. It further shows an appropriation of the narrow strip,

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and that its value was \$700. This makes the sum of the damages which the jury awarded to appellee, to wit, \$1,200. We can not say, as a matter of law, that an appropriation of a strip of land for a side track of a railroad injures the owner less than the actual value of the real estate taken.

Nor can we agree with counsel in the contention that the appellee's only remedy was to proceed under the special statute for the assessment of damages. Where the owner of land acquiesces in the appropriation, as the appellee does in the present case, such owner may recover in an action like the present one for the permanent injury sustained. *Indiana, etc., R. W. Co. v. Eberle*, 110 Ind. 542; *Porter v. Midland R. W. Co.*, 125 Ind. 476; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Chicago, etc., R. W. Co. v. Hall*, 135 Ind. 91; *Henderson v. New York, etc., R. R. Co.*, 78 N. Y. 423.

Other questions are presented by appellant's counsel, but what we have said in the previous portion of this opinion must be considered as conclusive of other points made by counsel in argument. There is no reversible error.

Judgment affirmed.

GAVIN, J., dissents.

Ross, J., did not participate in this opinion.

Filed April 6, 1894; petition for rehearing overruled Nov. 27, 1894.

No. 1,129.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD
COMPANY v. WILSON, ADMINISTRATRIX.

NEGLIGENCE.—*Proximate Cause.*—*Railroad.*—*Master and Servant.*—*Open Switch.*—*Absence of Switch Light.*—*Killing of Fireman.*—*Violation of Rule by Engineer.*—Where a railroad company negligently leaves a switch open, whereby a passenger train proceeding upon the main track in the night time runs into the switch and collides with a freight train standing upon the side track, killing the fireman of the passenger engine, without his fault, the company is liable, its act being a proximate cause of the injury, although, the switch light having accidentally gone out sometime prior to the collision, the engineer did not stop his train upon observing that there was no light, thus violating a rule of the company providing that the absence of a light was to be regarded as a signal of danger.

SAME.—*Contributory Negligence.*—*Absence of Switch Light.*—*Duty to Observe.*—In such case the fireman is not shown to have been guilty of contributory negligence, although required by a rule of the company to keep a constant lookout ahead when not engaged in firing, so as to give notice of danger to the engineer, where it appears that his duties and circumstances at the time were such that he could not have discovered the absence of the switch light in time to have given the engineer warning to stop the train, and where the engineer had notice that the light was not burning at least as early as the fireman could have communicated knowledge of such fact to him and had determined to proceed without stopping his train.

Ross, J., dissents.

From the DeKalb Circuit Court.

J. Morris, R. C. Bell, J. M. Barrett and S. L. Morris,
for appellant.

L. M. Ninde, W. L. Penfield and H. W. Ninde, for appellee.

DAVIS, J.—George R. Wilson was a fireman in the service of the appellant on a passenger train. The appellant, on the 6th day of December, 1889, at the station of Dune Park, negligently, in the evening, left the switch open, and thereby caused the train upon which

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he was firing to run off the main track onto the side track, whereby said passenger train collided with a freight train standing thereon, and instantly killed said fireman without fault on his part. The appellee recovered judgment in the court below for two thousand dollars.

The lamp provided for this switch was duly lighted and placed in position on this evening, as a signal that the switch was closed and locked, but the light accidentally went out an hour and a half before the passenger train reached this point.

It was provided by the rules of the company that the absence of a light at the switch should be regarded as a signal of danger. The engineer in charge of the passenger train was familiar with the rule and also saw when within a half mile of the switch that the light was out, or, rather, he failed to see any light there.

It is, therefore, contended by counsel for appellant that the engineer was negligent under the circumstances in failing to stop the passenger train, and that his negligence was the proximate cause of the injury, and that the negligence of appellant in leaving the switch open was a remote cause. In this connection it is proper to suggest that if we understand the record it appears that if the lamp which was lighted and placed on the switch as a signal of safety had not accidentally gone out that night before the arrival of the passenger train, the collision and wreck, which occurred on the switch track, would not only have been invited, but would have been inevitable. Therefore, the question is suggested whether the fact that the engineer failed to stop the passenger train on the occasion constituted an efficient and direct cause of the injury, and whether such cause, under the circumstances, was the independent wrongful act of a responsible third person. In other words, does it con-

clusively appear that this omission of the engineer was wrongful, and that such act was an intermediate and efficient cause disconnected from the primary act of negligence on the part of appellant and self-operating, which produced the injury. *New York, etc., R. R. Co. v. Perriguy*, 138 Ind. 414; *Pennsylvania Co. v. Congdon*, 134 Ind. 226.

In *Coppins v. New York, etc., R. R. Co.*, 122 N. Y. 557, s. c. 19 Am. St. R. 523, the facts were substantially that the train on which Coppine was employed as a brakeman was derailed by reason of a misplaced switch, and he was seriously injured. Martin Schrom was an employe of the company, and it was his duty to shift and close the switches. He negligently left the switch open. The Court of Appeals in the discussion of the question presented says: "If the evidence in the case justifies the conclusion that the engineer of the passenger train was negligent in not observing the target at the misplaced switch, or in running his train at a high rate of speed past the station in the absence of signals that the track was safe, that fact of itself is not available as a defence, if the negligence was established on the part of the defendant." See, also, *Stringham v. Stewart*, 100 N. Y. 516.

In the Perriguy case, *supra*, Judge HOWARD says: "If the negligence of the employer sets a cause in motion which continues until, in the end, it becomes a constituent element in bringing about the injury, so that the injury would not have occurred without the negligence of the employer; then, although the negligence of co-employes or other third persons may have contributed to the final result, yet the original negligence, still active to the end, is, in law, a proximate cause of the injury." See *Grand Trunk R. W. Co. v. Cummings*, 106 U. S. 700.

In discussing the question of proximate cause in

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Ohio, etc., R. W. Co. v. Trowbridge, 126 Ind. 391, Judge ELLIOTT says: "The principle underlying this doctrine is that there must be some connection between the effect and the cause—between the injury and the wrong. It is not necessary, however, that there should be a direct connection between the wrong and the injury; it is enough if it appears that but for the wrong no injury would have occurred, and that the injury was one which might have been anticipated. *Louisville, etc., R. W. Co. v. Nitsche*, ante, p. 229; *Milwaukee, etc., R. W. Co. v. Kellogg*, 94 U. S. 469. It is, indeed, not necessary that the precise injury which, in fact, did occur should have been foreseen; it is sufficient if it was to be reasonably expected that injury might occur to some person engaged in exercising a legal right in an ordinarily careful manner."

In *Cincinnati, etc., R. W. Co. v. Lang, Admx.*, 118 Ind. 579, the court says: "If the master's negligence is the principal cause of the injury, then he will not be absolved from liability, although the negligence of a fellow-servant may have concurred in causing the injury."

In *Pennsylvania Co. v. Burgett*, 7 Ind. App. 338, this court said: "The general rule is that where a servant receives an injury occasioned, in part, by the negligence of the master and in part by the negligence of a co-employee, the servant, if without fault on his part, may maintain an action against the master for such injury."

Counsel for appellant in this case concede that where the negligence of the master and his servant concur in producing an injury to another servant, the concurring negligence of the coservant will not relieve the master from liability, but their contention is that "Bickle's negligence was the immediate, sole, and proximate cause of the injury complained of."

Bickle was the engineer in charge of the passenger train.

Counsel say: "Could the leaving of the switch at Dune Park open by Demsky have caused the death of Wilson, had Bickle stopped when he discovered that the switch light was out, and not proceeded further until he learned that the switch was closed, or, if open, until he closed it?"

Again: "In the case in hearing, the death of Wilson was not directly attributable to the negligence of Demsky. It was the independent negligence of Bickle that made Demsky's negligence injuriously fatal to Wilson."

Counsel contend that the Perriguy case *supra* supports their position and is decisive of this case. The opinion in that case is founded upon the proposition that the engine in charge of Ferris was furnished with two good and sufficient hand lamps as a substitute for the regulation headlight, and that it was the duty of the engineer to light the headlight, whether it was the regulation light or the substitute hand lamps; and that the engineer failed in his duty to light the lamps; and that the proximate cause of the injury to Perriguy was the negligence of the engineer in failing to light the hand lamps.

Judge HACKNEY says: "In the present case the defect in the lamp of the headlight was a condition: the cause of the collision was the absence of the light. The absence of that light was not the defect, but was the failure of Ferris to light the hand lamps and place them in the headlight, from which the presence of his engine could be seen for the distance of five miles and the collision averted."

In considering the opinions of courts, it is well to bear in mind the observations of Chief Justice Marshall: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with

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the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may seem to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 6 Wheat. *265.

Again he says: "The positive authority of a decision is coextensive only with the facts on which it is made." *Ogden v. Saunders*, 12 Wheat. *333.

The value as precedents of the cases hereinbefore cited, in the decision of the question before us, should be measured by the rule above stated. It is not always easy to determine what is the proximate cause of an injury. As Judge HACKNEY well says in the Perriguy case *supra*: "Cases may illustrate, but definitions are not sufficiently explicit for practical application."

The general principles of the law in relation to proximate and remote causes, in actions growing out of negligence, are stated in the cases cited and are abundantly supported by the authorities to which reference is therein made.

In the light of these principles, was the negligent act of appellant the proximate cause of Wilson's injury? We should not, in the language of Judge HACKNEY, in determining this question, "predicate our decision upon a shadow while abandoning the substance." 138 Ind. 414, *supra*.

The rule of appellant, requiring a light at night at the switch, was intended as a signal that the switch was set and locked. When such light was not shown, its ab-

sence was intended as a signal of danger. When the light was not shown by the person whose duty it was to light and place the lamp in position, it was the duty of the engineer, under the rules of appellant, to stop his train until the condition of the switch was ascertained. It should be borne in mind that when the light was shown it was intended as a signal that the switch was set and locked, and that it was not then intended that the engineer should stop his train. In this case the lamp was duly lighted and placed in position. Suppose the collision had occurred while the lamp was burning. Could appellant have escaped liability on the ground that the act of the employe in showing the signal of safety was the proximate, and the negligence of appellant in leaving the switch open the remote, cause of the accident? We apprehend not.

On the other hand, can appellant shield itself from liability because the lamp which was lighted and placed in position as the signal of safety accidentally went out before the arrival of the train? In other words, was the act of the engineer, in failing to stop his train, under the circumstances of this case, a sufficient, intermediate and independent cause operating between the original wrong of appellant and the injury, to excuse appellant? The switch was negligently left open. Was there not an unbroken connection—a continuous operation between the wrongful act and the injury? If it was conceded that the engineer omitted or failed to perform his duty, in not stopping the train because the light which falsely announced that the switch was safe had accidentally gone out, and that such act on his part contributed as a cause to the injury, yet the fact remains that the wrongful act of appellant in leaving the switch open was a natural, proximate, and direct cause which contributed to the injury.

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In the case of *Clyde v. Richmond, etc., R. R. Co.*, 59 Fed. Rep. 394, decided in January, 1894, by the Circuit Court of the United States for the N. D. Georgia, which was an action by a fireman, similar in its essential features to the case in hand, the cause of the accident was the worn and defective condition of a rail, combined with the speed of the train, which was considerably greater than that which the schedule authorized. The negligence relied upon by the plaintiff was the worn condition of the rail. The negligence of the engineer in running the train at an improper rate of speed was shown by the evidence. It appeared that the excessive speed of the train would not have resulted in an accident had there been a proper and suitable rail at the point where the accident occurred, and that the worn and negligent condition of the rail would not have caused the derailment had the train not been running at an improper rate of speed. It was therefore contended that as the accident was caused by running the train at an excessive rate of speed there could be no recovery against the company.

The court, in the course of the opinion, says: "The rule clearly established at common law is that where an employe is injured by the negligence of the master in furnishing defective machinery and appliances, combined with the negligence of a fellow-servant, both contributing thereto, the master is liable." It is contended that, even if the defendants were guilty of negligence, their negligence was not the proximate cause of the accident. If the worn condition of the rail was instrumental at all in causing the derailment, it was just as much a present and effective cause of the accident as was the improper rate of speed. It was not in any sense a remote cause, for whatever it contributed, it contributed at the time and place. Both the improper speed of the train and the worn condition of the rail (assuming

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the report of the master to be correct) were the proximate causes.”

In this case, the most appellant can claim is that the engineer violated the rule of the company in failing to stop his train because there was no light shown at the switch. If he had stopped his train, there would have been no accident. In the Georgia case, if the engineer had not violated the rule of the company by running his train in excess of the schedule rate, there would have been no accident. The worn and defective rail would have been harmless if the train had not attempted to pass over it at an extraordinarily high rate of speed. The open switch would not have caused a collision if the train had not run into it. Notwithstanding the act of the engineer in doing that in the absence of which the accident would not have happened, the court holds that the negligence of the company was a proximate cause of the injury.

If that case is correctly decided on the facts, it necessarily follows that the failure of the engineer to stop the train does not excuse the negligence of appellant in leaving the switch open. In our opinion, under the facts and circumstances of this case, the act of appellant in failing to set and lock the switch was a proximate cause of the collision.

This conclusion is in harmony with the decision of our own Supreme Court hereinbefore cited as we understand them.

The entire argument of counsel for appellant on the question of contributory negligence, is as follows:

“We think that the special findings of the jury show that the deceased, Wilson, was guilty of negligence contributing to his injury. It is impossible to believe that he did not know, or that, by the exercise of reasonable diligence he might not have known, that the switch

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light was out when a half mile east of the switch. It was his duty to keep a lookout for this. If he might have known that the light was out, it was his duty not only to call the engineer's attention to the fact, but to see to it that the engine and train were stopped until he could know that all was safe. We think that the special findings of the jury show this. He could have seen the danger signal by the exercise of reasonable care, and have requested the engineer to stop. Failing to do so, he was guilty of contributory negligence."

One of the rules of the company in relation to the duties of said decedent were as follows: "When running upon the road, they must keep a constant lookout ahead, when not engaged in firing, so as to give notice to the engineer of any signals or indication of danger."

The answers of the jury to interrogatories show that after the engine passed around the curve, approaching Dune Park station, Wilson was engaged in putting coal into the furnace of the engine, and that while he was so engaged he had to look into the furnace to see where to place the coal, and that the effect of the heat and bright flame in the furnace was to dazzle his eyes, and to some extent affect the power of his vision; that the engine was then running forty to forty-five miles per hour, and that when he got through feeding the furnace, some time elapsed before his eye could adjust itself to see objects or the absence of objects in the distance; that owing to the curve east of said Dune Park station, the engineer and fireman on an approaching train from the east, could not see whether the switch lights were burning or not at said station until after rounding the curve, and after said curve is rounded by trains moving westward the track is straight and somewhat down grade for a distance of half a mile; that said decedent was engaged

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in feeding the furnace when the engine rounded the curve, and that he could not be on the lookout for switches while he was thus engaged, and that under the circumstances in which Wilson was placed at the time after he had finished feeding said furnace, and after his vision had recovered from the glare of the furnace so that he could discover whether said north switch light was burning or not, it was too late for him to give warning to Bickle in time to stop the train and avoid the collision.

The jury further found that before Wilson had finished feeding the furnace, Bickle had discovered that the switch light was out, and determined to run on without checking the speed of the train; that owing to the speed at which the train was running, and its being down grade, the train would have required a distance of a quarter of a mile or more to be stopped; that by the rules of the appellant, Bickle was charged with the safety of the train and responsible, with the conductor, for keeping the train on time, and that it was the engineer's duty to have his train under such command as to be able to stop should the switch prove wrong, and that it was for the purpose of carrying out said rules and keeping his train on time that Bickle did not check the speed of the train until it became too late to stop it and avoid the collision, and that by the rules of the company the fireman was placed under the immediate superintendence of the engineer, and was required to obey his reasonable directions in all matters concerning his duty.

The general verdict affirms that Wilson was without fault. The special findings are not in conflict with this view. In fact, it is expressly found that his duties and circumstances were such at the time that he could not have discovered the absence of the switch light in time to have given warning to the engineer to stop the train

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and avoid the collision. If he had discovered that the light was not burning, all he could have done was to give notice of this fact to the engineer, and it clearly appears that the engineer had the notice that the light was not burning as early at least as Wilson could have communicated such knowledge to him.

It is affirmatively found that the failure of appellee to give such notice did not contribute to the injury, because without reference to the notice the engineer had determined to proceed without checking the speed of the train.

In the light of the general verdict, and the answers of the jury to the interrogatories, it requires no argument, in the opinion of the writer, to show that Wilson was not guilty of any negligence on his part that contributed as a proximate cause to the injury.

There are other interrogatories which in some respects are apparently in conflict with those to which we have referred, but such conflict in the special findings with each other can not be resorted to for the purpose of overthrowing the general verdict. Where the answers to the interrogatories contradict or negative each other, the general verdict stands. It is a familiar rule that the special findings control only where they are in irreconcilable conflict with the general verdict.

Judgment affirmed.

Filed Oct. 10, 1894; petition for a rehearing overruled Dec. 11, 1894.

DISSENTING OPINION.

Ross, J.—From the facts in this case, it is evident that there were two causes, either of which might have brought about the injury for which damages are sought in this action, namely: The neglect of the brakeman, Demsky, of the freight train, to close the switch after his train had backed upon the side track and the

negligence of the engineer and fireman of the passenger train to stop their train in obedience to the rules of the company.

It requires no argument to show that in the absence of either of these acts of negligence the accident would not have occurred. For if Demsky had closed the switch, as it was his duty to do, the passenger train would have proceeded along the main track and there would have been no collision. By this neglect of duty on his part the passenger train was thrown upon the side track and collided with the freight train, resulting in the death of the decedent. On the other hand, if the decedent and his engineer had stopped their train when they saw that the switch target was without a light, and had not attempted to pass the switch until assured that it was closed, as it was their duty to do under the rules of the company, the accident could not and would not have happened. Without the intervention of either of these causes the accident could not have occurred, and the decedent would not have been killed.

Conceding that the jury, by their verdict, found that the appellant was guilty of negligence in retaining in its service the brakeman Demsky after it acquired knowledge of his incompetency, it still remains to be determined whether or not his negligence in leaving the switch open was the proximate cause of the injury or whether it was the result of some other cause, either that of some third person or of the decedent himself.

In an action where it is shown that two causes combined produced the injury complained of, both of which causes are proximate in their character, one being the result of the defendant's negligence and the other an occurrence for which neither party is to blame, the defendant will be liable, provided the injury would not have been sustained except for his negligence. *Grimes v.*

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Louisville, etc., R. W. Co., 3 Ind. App. 573, and cases cited.

It is a common, if not almost a universal, expression of courts, that every person is bound to anticipate the results which naturally flow from his acts, and for that reason is answerable for an injury resulting therefrom. But in the case of *Milwaukee, etc., R. W. Co. v. Kellogg*, 94 U. S. 469, Justice Strong, speaking for the court, says: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to this misfeasance or nonfeasance. They are not when there is sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

If a party does an act which might naturally produce an injury to another as its consequence, and before any such injury results, a third person does some act or omits to perform some duty, and this act or omission of the third person is the immediate cause of an injury which would not have resulted except for such act or omission, the act or omission of such third party is the immediate or proximate cause, and the act of the first party but an indirect cause; the causal connection between the act of the first party and the injury is broken by the interposition of the act or omission of the third party. *Washington v. Baltimore, etc., R. R. Co.*, 17 W. Va. 190; *Pike v. Grand Trunk R. W. Co. of Canada*, 39 Fed. Rep. 255; *Insurance Co. v. Tweed*, 7 Wall. 44; *Milwaukee, etc., R. W. Co. v. Kellogg*, *supra*; *Lewis v. Flint, etc., R. W. Co.*, 54 Mich. 55; *Curtin v. Somerset*, 140 Pa. St. 70; Wharton Neg. (2d ed.), sections 134 and 438.

In this case the only question to be determined is,

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what was the proximate cause of the collision resulting in decedent's death? The proximate cause is not necessarily the last preceding cause which conduced to the happening of the event, but it is the cause closest allied to the event without which it could not have happened. It is impossible, as is clearly demonstrated by the opinions of our most learned jurists, to state a fixed rule that can be applied in determining the proximate cause in all cases—much often depends upon the circumstances of the particular case, and what is, or what is not, a proximate cause will often have to be determined upon considerations of sound judgment and enlightened common sense, without the aid of any certain or infallible rule.

In *Marble v. Worcester*, 4 Gray, 395, SHAW, C. J., says: "The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery;" and, again, "Perhaps no event can occur, which may be considered as insulated and independent; every event is itself the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences, more or less immediate or remote. The law however looks to a practical rule, * * * and on account of the difficulty in unraveling a combination of causes, and of tracing each result, * * * to its true, real and efficient cause, the law has adopted the rule * * * of regarding the proximate, and not the remote cause of the occurrence which is the subject of inquiry."

It appears to the writer that to solve the question of proximate cause in this case is a matter of little difficulty, as I hope to make clear.

To determine the cause efficient, we have but to consider what each of the parties were bound to anticipate would be the result of their acts and omissions, and when

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that is understood, we have solved the main difficulty which presents itself.

The appellant was bound to know that trains proceeding along the road could not pass the switch when open. It also knew that under its rules governing the operation of its trains, no train was allowed to attempt to proceed with a switch in that condition, and it had a right to assume that those in charge of the passenger train would do their duty and would not attempt to proceed when the switch was open. The decedent knew that if he attempted to proceed with the switch open a collision must inevitably occur with whatever might be upon the side track.

The appellant was not bound to anticipate the happening of the accident by the omission of its duty to close the switch, unless it was also bound to anticipate that the decedent and his engineer would fail to do their duty. The law imposes no such duty on appellant, but only requires that appellant answer for the results which naturally flow from its negligence. It could not be expected that the decedent and his engineer, knowing that Demsky had left the switch open, would not do their duty and stop their train. On the contrary, it was to be presumed that they would not, knowingly, cast themselves in the way of a danger which must inevitably result in injury.

"Where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, * * the negligence of the second party is the sole proximate cause of the injury." *Bostwick v. Minneapolis, etc., R. W. Co.*, 51 N. W. Rep. 781.

The above language was quoted with approval by our Supreme Court in the recent case of *New York, etc., R.*

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W. Co. v. Perriguet, 138 Ind. 414, which was an action to recover for an injury to an employe, alleged to have been the result of the company's negligence in failing to furnish a headlight on an engine, by reason of which it collided with another train.

The facts in that case disclosed that while the railroad company was negligent in failing to furnish a good and sufficient headlight, which, had it been furnished, might have averted the accident, yet the facts disclosed that those in charge of the train in violation of an order of the company run their train out upon the main track, from a side track where they were to await the arrival and passage of the other train. From these facts the court held that it was not the negligence of the company in failing to furnish a headlight that was the proximate cause of the collision, but the negligence of the servants in running the train out on the main track in violation of its order.

Again, in the case of *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335, which was an action brought by the appellant to recover for an injury caused by the explosion of natural gas which had been negligently permitted to escape in the cellar of one Kilburn, and after repeated requests, and a promise by the company to shut off the gas so that no more would escape, McGahan, who had been employed by the owner of the property to find the leak, and repair the pipe in the cellar, went into the cellar with a lighted candle, and the accumulated gas exploded causing the injury. The court after reviewing the facts held that the failure of the company to turn the gas off, and thus permit its escape and accumulation in the cellar was not the proximate cause of the injury, but that the negligence of McGahan in going into the cellar with a lighted candle was the proximate cause.

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If these cases are to stand, and be recognized as authority, I think them decisive of the question presented in this case as to the proximate cause of the decedent's injury. In fact it was conceded by counsel for appellee in arguing this case orally before this court, that the question presented in this case was identical with that in the case of *New York, etc., R. W. Co. v. Perriguy, supra*, and that if the original opinion in that case, which had been rendered prior to such oral argument, was to stand it was decisive of this case, and the judgment would have to be reversed.

There is some conflict in the answers to the interrogatories as to just when the decedent first saw that the light on the switch target was not burning, but that he knew it when his engine was more than a quarter of a mile distant I think is undisputed, and also that after he became cognizant of the danger he made no effort to stop his train, neither did he attempt to slacken its speed.

Under the rules of the company, made for the operation of its trains, and with which the decedent was familiar, the jury find it was the duty of both the decedent and his engineer to be vigilant, and to act with the utmost promptness in stopping the train whenever anything which might be taken as a signal of danger was seen. They were to take no risks.

If signals of safety were not shown at any point where they ought to be, it was the duty of the fireman to inform the engineer, and his duty to stop or go carefully until assured that it was safe to proceed. That they discovered the danger, the engineer when more than half a mile away and the fireman when between a quarter and a half mile distant, and that they made no effort either to stop or even slacken the speed of the train, which was then running at the rate of forty miles per hour, is also found by the jury, and they find further that the train was

equipped with air brakes and other appliances for stopping, which were so constructed and arranged as to be operated by either the engineer or fireman, which would have enabled those on the engine to have stopped the train within a quarter of a mile.

Without a rule of the company imposing it as a duty those in charge of and operating a locomotive hauling a passenger train should exercise the greatest vigilance for the safety not only of themselves, but of those helplessly in their charge, who are so situated as to be without the means of knowing of approaching danger or the power to avert it. The instinct of self-preservation would lead one to exercise at least ordinary care, and to fail in the performance of this duty is not merely evidence of negligence, but is of such a degree as to evince a total disregard of consequences.

When an employe disobeys a rule established by his employer for the carrying on of his business, and the disobedience proximately contributed to the employe's injury, he can not recover although the employer's negligence also contributed thereto. *Pennsylvania Co. v. Whitcomb*, Admr., 111 Ind. 212; *Matchett v. Cincinnati, etc., R. W. Co.*, 132 Ind. 334.

For it is well settled in this State that one seeking to recover for an injury by reason of the negligence of another must show affirmatively not only that the defendant's negligence caused the injury, but that he himself in no way contributed thereto. That is, that he omitted no duty which, if observed, would have prevented the injury. *Toledo, etc., R. W. Co. v. Brannagan*, Admx., 75 Ind. 490; *Stoner v. Pennsylvania Co.*, 98 Ind. 384; *Lyons v. Terre Haute, etc., R. R. Co.*, 101 Ind. 419; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene*, Admx., 106 Ind. 279;

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City of Fort Wayne v. Coombs, 107 Ind. 75, and cases cited.

For where two causes combined produced an injury, one of which causes is the result of the negligence of the injured party himself, he can not recover damages from the party whose negligence produced the other cause, for the reason that the injured party's own negligence was a factor in bringing about the result.

The debatable question that now confronts us is: Did the failure of the decedent to stop or slacken the speed of his train in any way contribute to his injury? A sufficient answer to this is, that had he stopped his train as he could and should have done, he would not have been injured. This failure on his part to do his duty was the direct cause of the collision which resulted in his death. Whether the failure to stop the train was the disobedience of the decedent or his engineer, Bickle, such disobedience was, nevertheless, the direct and proximate cause of the collision which resulted in decedent's injury. Under such circumstances the appellant is not liable. I am compelled, therefore, to dissent from the views expressed by the majority of the court.

Filed Oct. 10, 1894.

No. 1,519.

DEAN v. BROCK ET AL.

AGENCY.—*Nonliability of Agent for Nonfeasance of Duty Owing the Principal.*—If an agent fail to perform a duty which he owes to his principal, and by reason of such nonperformance or neglect of duty a third person sustains injury, no action can be maintained against the agent by such third person on account thereof.

SAME.—*Rental Agent.*—*Failure to Keep Premises in Tenantable Condition.*—*Nonliability of Agent.*—The failure of an agent employed to

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look after, rent, collect rents, pay taxes, and make the necessary repairs of certain premises, and keep them in a tenantable condition, is nonfeasance of a duty owing his master, and not misfeasance, and does not render the agent liable to a third party.

From the Marion Superior Court.

W. F. A. Bernhamer and *W. W. Pickerill*, for appellant.

Ross, J.—The appellant brought this action against William P. Brock, George E. Brock, Robert F. Catterson and George N. Catterson, alleging, in substance, that William P. Brock was the owner of certain real estate in the city of Indianapolis, upon which was situated a dwelling house and other necessary out buildings, among which was a building used as a “water closet or privy”; that the Cattersons were employed as the agents of William P. Brock to look after and rent said dwelling, collect the rents, pay the taxes, and make the necessary repairs to keep the same in a tenantable condition; that on or about June 17, 1892, appellant rented said dwelling from the Cattersons and took immediate possession, and was still in such possession at the commencement of this action, August 24, 1892; that the sills and joists under the floor of said water closet “were rotted and decayed, and had not been replaced, examined or repaired for more than twenty years; all of which the said defendants (appellees) well knew, but plaintiff (appellant) was ignorant thereof”; that on the 31st day of July, 1892, while appellant was rightfully in the building, the floor broke through, injuring her, etc.

There are other allegations charging that it was the duty of the appellees to ascertain and know the condition of the building, and to keep it in suitable repair, etc., but we deem it unnecessary, in the determination of this case, to set them out.

The appellees William P. Brock and George E. Brock

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did not appear, and the record does not show that process was ever served upon them.

The appellees, the Cattersons, filed a joint demurrer to the complaint, which was sustained by the court, and this ruling presents the only question for our consideration.

The contention of counsel is that the Cattersons, who were the agents of William P. Brock, were guilty of negligence in failing to make this building safe for the use for which it was intended; that "their negligence was misfeasance, and not mere nonfeasance."

We think counsel's contention untenable. An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort, and if he does, not only the principal, but the agent, may be made to answer in damages therefor. But where a duty rests on the principal and not on the agent, its nonperformance by the latter creates no liability against him, if injury results. True he may owe a duty to the principal to faithfully discharge his duties as agent, but he owes no duty to others except that in the performance of those duties he shall not do anything which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and by reason of such nonperformance or neglect of duty a third person sustains injury, no action can be maintained against the agent by such third person on account thereof. Mechen Agency, section 539; Bishop Noncontract Law, section 695; *Crandall v. Loomis*, 56 Vt. 664; 1 Am. and Eng. Encyc. of Law, 406, and cases cited.

Great confusion has apparently crept into many cases from a failure to observe the proper distinction between non-feasance and misfeasance. Non-feasance is the failure to do that which one by reason of his undertaking, and not because imposed upon him as a legal duty, he

agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal.

Misfeasance, on the contrary, may consist in failing to do that which is imposed as a duty, or in doing for another, in an improper manner, that which the principal ought to have done. As of the latter class would be where an agent actually undertakes and enters upon the performance of a certain work for the principal, in the execution of which it is his duty to use reasonable care in the manner of executing it, so as not to cause injury to others, and he can not, by failing to exercise such care, either while performing the work or by abandoning it in an uncompleted condition and leaving it unguarded or unsafe, exempt himself from liability to those who may suffer injury by reason of such negligence. *Osborne v. Morgan*, 130 Mass. 102.

This case, however, can not be said to be one of misfeasance, because the appellees, the Cattersons, were under no legal duty to keep the property in repair and safe for use, neither did they, in making the repairs, do so in a negligent manner. They simply neglected to perform for their principal the duty which he owed to his tenants. Their failure to do was merely a non-feasance and not a misfeasance.

The cases cited by counsel are all cases where the agent was held liable for misfeasance. In none of those cases did the court hold that the agent was liable for failing to perform a duty owing from the principal to another who was injured by reason of such neglect of duty. That when an agent owes a duty and one to whom the duty is owing is injured by reason of the failure to perform such duty, the agent is liable, does not admit of question, for he is liable for the result of his neglect to perform any duty devolving upon him in his individual character. Not so, however, when he is

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simply the agent of the principal to perform the duty owing from the principal to others.

The complaint stated no cause of action against the appellees, the Cattersons.

Judgment affirmed.

Filed Nov. 13, 1894; petition for a rehearing overruled Jan. 30, 1895.

No. 1,359.

COSAND v. LEE, BY NEXT FRIEND.

SLANDER.—Complaint.—Averment as to Sex.—Where a complaint for slander gives the plaintiff a feminine name and uses pronouns designating the feminine gender, it sufficiently shows that the plaintiff is a female.

SAME.—Words Charging Fornication, etc.—Under the statute (section 286, R. S. 1881), words which are sufficient to charge a female with incest, fornication, adultery or whoredom, are actionable, whether they charge a crime or not.

SAME.—Words Not Actionable Per Se Must be Spoken and Understood in Slandorous Sense.—The following words: "Ah, Flora, you want to come home and have another young one like you did last summer," or "Ah, Flora, you want to come home and lose another young one like you did last summer," are not actionable *per se*, and a complaint declaring upon them must, to be good, show by the innuendo not only that the words were slanderously uttered, but that they were so understood by the hearers.

SAME.—Words Capable of Two Constructions.—Province of Jury.—When the words alleged to have been spoken are capable of two constructions, one of which would be innocent, it is for the jury to determine whether they were used and understood in that sense or otherwise.

From the Boone Circuit Court.

S. M. Ralston, M. Keefe and W. J. Darnall, for appellant.

R. W. Harrison, —. Adams and —. Carter, for appellee.

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REINHARD, J.—This is an action of slander. The first error assigned is the overruling of the appellant's demurrer to the appellee's complaint. The first objection urged to the complaint is that it does not show the plaintiff to be a female.

The complaint begins thus: "The plaintiff, Flora E. Lee, suing by her next friend," etc.

The feminine gender is employed throughout the complaint in the use of the pronoun referring to the plaintiff. We think it sufficiently designates the plaintiff as a female.

It is next objected that the words charged to have been spoken of the appellee are not actionable *per se*. It is averred in the complaint that the appellant, maliciously intending to injure the good name of the appellee, and to cause it to be believed that she had been guilty of the crime of having had illicit intercourse with men, on the 12th day of October, 1893, in a certain discourse, at Boone county, Indiana, which the appellant then had of and concerning the appellee, and in the presence and hearing of divers good people, falsely and maliciously spoke of and concerning the appellee the following false, scandalous and malicious words, to wit: "Ah, Flora (meaning the plaintiff), you want to come home and lose another young one like you did last summer;" intending thereby to and charging the appellee with having been guilty of having had illicit sexual intercourse with men, and of having become pregnant, and of having given birth to an illegitimate child.

"Ah, Flora (plaintiff meaning), you want to come home and have another young one like you did last summer,"—intending thereby to charge the appellee with having been guilty of having had illicit sexual intercourse with a man, and of having become pregnant, and having given birth to an illegitimate child.

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It is also alleged that the appellee is, and always has been, unmarried, and is under the age of twenty-one years.

A demurrer was addressed separately to each set of words.

The appellant's counsel contend that the words in neither set are actionable, because they do not charge a crime. This is not necessary.

"Every charge of incest, fornication, adultery, or whoredom, falsely made by any person against a female * * * shall be actionable in the same manner as in the case of slanderous words charging a crime, the commission of which would subject the offender to death or other degrading penalties." R: S. 1894, section 286.

If the words are sufficient to charge the appellee with incest, fornication, adultery or whoredom, they are actionable, whether they charge a crime or not.

It was not necessary to aver that the words had a provincial or local meaning. The inducement and innuendo laid in the complaint show that the words were spoken of and concerning the plaintiff, and in the presence and hearing of divers good people, and with the intention and to cause it to be believed that she had been guilty of having had illicit sexual intercourse with a man, or with men, and of having become pregnant and given birth to an illegitimate child.

This is a sufficient averment that the words were spoken in a slanderous sense, and if they were so intended, and can be given that construction, and were so understood, it matters not whether they were actionable *per se* or not, they will be sufficient. When the words alleged to have been spoken are capable of two constructions, one of which would be innocent, it is for the jury to determine whether they were used and understood in

that sense or otherwise. *Waugh v. Waugh*, 47 Ind. 580.

In *Branstetter v. Dorrough*, 81 Ind. 527, it was said: "We need not determine whether the words are or are not slanderous *per se*, for the inducement and innuendo clearly show that they were uttered slanderously, and are actionable."

In the same case the following quotation from Fortescue, J., in *Button v. Hayward*, 8 Mod. 24, was approved by the court: "It was the rule of Holt, C. J., to make words actionable whenever they sound to the disreputation of the person of whom they were spoken; and this was also Hale's and Twisden's rule; and I think it a very good rule."

The court then continues to say: "Charges of unchaste conduct are seldom made in plain words; they are almost always made by indirection and insinuation, but, however made, the words are slanderous when they are intended to convey, and do convey, to the minds of the hearers, the meaning that the unmarried woman, of whom they are spoken, was guilty of fornication." See, also, *Buscher v. Scully*, 107 Ind. 246; *Binford v. Young*, 115 Ind. 174; *Freeman v. Sanderson*, 123 Ind. 264.

It is further contended, however, that as neither set of words is actionable *per se*, the complaint is clearly insufficient for not averring that the words were understood, by those in whose presence they were spoken, as intending to charge the appellee with fornication, or at least with unchaste conduct. It is not alleged that the words were understood in that sense or had a local or provisional meaning. As we have said, there was a separate demurrer to each group of words. The first set of words is: "Ah, Flora, you want to come home and lose another young one, like you did last summer." These

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words are not actionable *per se*. We can not say that charging an unmarried female with losing a young one necessarily means, and must be understood to mean, that she has given birth to a child. It may mean that, but it may also mean a thousand other things. To make the words actionable, there must be an innuendo showing two things:

First. That they were spoken in a slanderous sense, which, as has been said, is sufficiently shown in the complaint.

Second. That they were understood in the same slanderous sense by those in whose hearing they were spoken.

The latter averment is wholly absent from the complaint. The rule is correctly stated by Lord Ellenborough, in *Woolnoth v. Meadows*, 5 East 463, 469, where he says:

“The plaintiff must have gone into other proofs than of the mere speaking of the words, and he must not only have shown that the defendant’s meaning was to impute a crime of that nature * but that the words were so understood by the hearers.”

While we have been referred to no case in this State, and have found none directly holding that such an averment is essential, there are many cases where the point is decided by the clearest inference.

In *Harrison v. Manship*, 120 Ind. 43, the complaint alleged that the defendant spoke of and concerning the plaintiff, that he “took and drove off his (meaning defendant’s) ducks and sold them; * * and that if he (meaning plaintiff) was so mean as to drive his (meaning defendant’s) ducks off and sell them, that he could have them,” which charges were false and slanderous. The court said: “There is no colloquium or innuendo laid in this complaint. We have simply the words ‘he drove off my ducks and sold them,’ without any averment as to

the circumstances under which the words were spoken, or as to the sense in which they were used, or as to how they were understood." The complaint was held fatally defective for the want of these averments, even after verdict.

In *Freeman v. Sanderson*, *supra*, ELLIOTT, J., speaking for the court, said: "When slanderous words are used, which, by proper inducement and innuendo, may be shown to have been used with the intent to charge, and were understood by the persons who heard them to charge, a female with incest, fornication, adultery, or whoredom, they are actionable the same as if the person speaking the words had charged such female, in specific words, with being guilty of fornication or adultery."

In *Berry v. Massey*, 104 Ind. 486, the court, speaking through the same learned judge, ruled that where the hearers of the slanderous charge know the particular transaction referred to, and know that the transaction was not such as constituted a crime, no action for slander can be maintained.

In *Patch v. Tribune Assn.*, 38 Hun (N. Y.) 368, it was decided that if the words are capable of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it must be left to the jury to say that they were in fact so understood.

Of course where the words are actionable *per se*, no colloquium or innuendo is necessary. And where the words are incapable of ascribing to them the meaning claimed for them in the complaint, their meaning can not be extended or enlarged by extrinsic averments in the way of a colloquium or innuendo. Where, however, the alleged slanderous words are capable of conveying the meaning claimed for them, and also equally capable of conveying some other and innocent meaning, we think the proper rule is that the innuendo should show not only

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that the words were spoken in the slanderous sense, but were also understood in that sense. The words not being actionable *per se* can not be presumed to have been understood in a slanderous sense. For the reasons stated, we think the court should have sustained the demurrer to that portion of the complaint alleging the speaking of the group of words first set forth.

Judgment reversed.

Filed Nov. 27, 1894.

No. 1,335.

CASE v. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY ET AL.

RAILROAD.—Common Carrier.—Notice by Shipper of Loss or Damage.—

Time of.—While common carriers can not, by contract, relieve themselves from liability for their own negligence, they can, by contract with the shipper, provide for a reasonable time within which notice of claim for loss or damages shall be given as a condition of liability and the manner of giving it.

SAME.—Common Carrier.—Time of Notice of Damage or Loss.—When Reasonable.—A provision in a contract of shipment fixing the time at ten days, in which notice of damage or loss shall be given as a prerequisite to liability, is a reasonable one.

SAME.—Notice of Loss, etc.—Waiver.—Mere knowledge by the agents of the company that the shipper claimed to have lost some of his stock, coupled with a search therefor along its right of way, did not amount to a waiver.

From the Benton Circuit Court.

D. Fraser and W. Isham, for appellant.

J. T. Dye, W. V. Stuart, C. B. Stuart and E. P. Hammond, for appellees.

GAVIN, J.—The appellant sued appellee upon two limited-liability, live-stock contracts, alleging a failure

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upon appellee's part to safely carry and deliver the property shipped. A general averment of performance upon the part of appellant is contained in the pleading. Appellee answered by a general denial. Upon the trial a special verdict was returned, upon which judgment was entered over appellant's exception. The correctness of this action by the trial court is the first question for consideration.

The law is well settled that in order to justify a judgment in favor of the party upon whom rests the burden of proof, every fact essential to his recovery must be found. If the verdict be silent as to any particular fact, it stands as though found against him upon whom rests the burden of proof. Elliott App. Proceed., section 753; *Sult v. Warren School Tp.*, 8 Ind. App. 655; *Shipps v. Atkinson*, 8 Ind. App. 505.

The contracts each provide that there shall be no liability unless a claim in writing, etc., be presented within ten days from the time of the removal of the stock from the car. The special verdict is entirely silent as to any such claim having ever been presented to appellee at any time.

The appellee insists that compliance with this provision is a prerequisite to appellant's recovery, while appellant argues, 1st, that any failure to present the claim is matter of defense to be presented by answer, and, 2d, that the requirement is void and invalid as being unreasonable.

In behalf of this latter position no authority is cited. In support of the former we are referred to *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, and *Western Union Tel. Co. v. Jones*, 95 Ind. 228, in the former of which cases the Supreme Court held that where a message blank contained a provision for nonliability in any case "where the claim is not presented within 60 days,"

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the failure to present such claim must be pleaded specially, and was not admissible under the general denial.

It is to be noted, however, that these cases were suits to recover a statutory penalty for failure to send the message, and were not founded upon the message and its provisions as the basis of the action.

That such a provision as we are here considering (when reasonable) must be regarded as a condition precedent, performance of which must be alleged in order to make the complaint good was decided in *United States Exp. Co. v. Harris*, 51 Ind. 127, followed by this court in *Widman v. Louisville, etc., R. W. Co.*, 9 Ind. App. 190.

To the same effect is *Chicago, etc., R. R. Co. v. Simms*, 18 Ill. App. 68.

In *Westcott v. Fargo*, 61 N. Y. 542, a different holding was made, the same rule being applied as is laid down in our telegraph cases. These telegraph cases, however, in no manner purport to modify or overrule the *Harris* case, which established the rule as to actions against common carriers on the special contracts, and while the writer would be strongly disposed to view the question otherwise were it an open one, we do not feel justified in departing from the principle adopted by our Supreme Court in this class of cases.

In many of the States, the procedure seems different from ours, the suits being brought simply upon the general common carriers liability, the company then setting up the special contract with its limitations and conditions.

While common carriers can not, by contract, relieve themselves from liability for their own negligence, it must be regarded as settled law that it is legitimate for the carrier, by contract with the shipper, to provide for a reasonable time within which notice of claim for loss

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or damage shall be given as a condition of liability, and the manner of giving it. *Widman v. Louisville, etc., R. W. Co., supra; United States Exp. Co. v. Harris, supra; Western Union Tel. Co. v. Jones, supra; Western Union Tel. Co. v. Scircle, supra; Jennings v. Grand Trunk R. W., etc., 127 N. Y. 438; Glenn v. Southern Exp. Co., 86 Tenn. 594; Southern Exp. Co. v. Caldwell, 21 Wall. 264; Armstrong v. Chicago, etc., R. W. Co., (Minn.) 54 N. W. Rep. 1059.*

In all these cases the time fixed was thirty days or more, except in that in 127 N. Y. 438, where it was thirty-six hours, which was held unreasonable under the circumstances.

In the following cases the notice was required to be given before removal of the stock, and yet the requirement was deemed reasonable: *Sprague v. Missouri Pac. R. W. Co., 34 Kan. 347; Western R. W. Co. v. Harwell, 91 Ala. 340; Selby v. Wilmington, etc., R. R. Co., 113 N. Car. 588; Wichita, etc., R. W. Co. v. Koch, 47 Kan. 753; Owen v. Louisville, etc., R. R. Co., 87 Ky. 626.*

In *Lewis v. Great Western R. W. Co., 5 H. & N. *867*, the time was either three or seven days, it is somewhat difficult to determine which from the report.

In *Dawson v. St. Louis, etc., R. W. Co., 76 Mo. 514*, the notice was to be given in five days to the general freight agent.

In *Black v. Wabash R. W. Co., supra, and Chicago, etc., R. W. Co. v. Simms, supra*, a verified notice to the general freight agent within five days was adjudged a reasonable provision.

In *Adams Exp. Co. v. Reagan, 29 Ind. 21; Southern Exp. Co. v. Caperton, 44 Ala. 101*, 30 days from date, and in *Pacific Exp. Co. v. Darnell, 6 S. W. Rep. 765*, sixty days from date were held unreasonable, under the peculiar circumstances of the cases. These cases,

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however, do not overthrow the proposition established by the numerous other authorities to which we have referred, which force us to the conclusion that the provision in this contract is, on its face, reasonable.

While strict performance may be waived, or the circumstances may be such as to excuse the party from the presentation of the claim within the time prescribed (*Western Union Tel. Co. v. Jones, supra* (233); *Merrill v. American Exp. Co.*, 62 N. H. 514), there is nothing in the facts of this case which would operate either as a waiver or excuse. Mere knowledge by the agents of the company, that the shipper claimed to have lost some of his stock, coupled with a search therefor along its right of way, was not a waiver. *Owen v. Louisville, etc., R. R. Co.*, 87 Ky. 626.

It has also been adjudged that the reasonableness of the provision may depend upon the circumstances of the particular case, which may be such as to make the presentation of the claim a substantial performance, although not within the time limited, when the fact of the loss was not then known and the claim was made within a reasonable time after this fact became known, or in the exercise of reasonable diligence should have been ascertained. *Louisville, etc., R. W. Co. v. Steele*, 6 Ind. App. 183; *Glenn v. Southern Exp. Co., supra*; *Western R. W. Co. v. Harwell, supra*; *Harned v. Missouri Pacific R. W. Co.*, 51 Mo. App. 482.

We are unable to see how the agreement made by the parties as to this fact can aid the verdict.

The agreement related merely to the establishment of the fact for use as evidence and was so interpreted by the parties, being offered in evidence by the appellant himself.

No question is presented by the motion for new trial, for the reason that it was presented too late, at the fol-

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lowing term of court after verdict rendered, the verdict not being returned on the last day of the term. *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571; section 570, R. S. 1894, section 561, R. S. 1881.

Judgment affirmed.

Filed Jan. 10, 1895.

No. 1,052.

ROUNTREE, ADMINISTRATRIX, v. PURSELL ET AL.

GIFT.—*Devise.*—*Descent.*—Strictly speaking, a gift is not a devise nor a devise a gift, and property, which came by descent, could not have come by either gift or devise.

SAME.—*Definition.*—To give is to transfer the ownership of property from one person to another gratuitously, without an equivalent or consideration. The gift is the thing transferred. The word "gift," in its larger signification, applies to either realty or personalty.

WILL.—*"Devise" and "Bequest" Defined.*—The word "devise" usually relates to real estate acquired through a will. It is a gift by will of real estate, and can not be applied, with legal precision, to personal property. A "bequest" is a gift by will of personal property; but in order to favor the manifest intention of the testator, the courts often construe the word "bequest" to mean "devise," and "devise" to mean "bequest."

DESCENT.—*"Descend" Defined.*—*Power of Legislature.*—The word "descend" ordinarily means, in the statutes of descent, to go down; but it may mean, in the devolution of property, to "ascend"; and the Legislature has the power to give it such a meaning.

SAME.—*"Gift, Devise or Descent," Property Included by.*—The term "gift, devise or descent," as used in our statutes of descent, includes all property, both real and personal, which comes to the intestate without an equivalent or consideration being paid for it.

SAME.—*Personal Property.*—*Title of Heirs.*—*No Administration.*—Heirs have title and interest in the personal estate of their ancestor before the appointment of an executor or administrator, subject to be divested by such appointment. If the personal property is not needed to pay debts of the ancestor, the heirs may distribute it among themselves without formal administration. They take the title thereto by

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force of the statute, in the same manner as they acquire title to the real estate.

SAME.—Heir.—Definition of.—Under the statutes of this State an heir is one who succeeds to the estate, both real and personal, immediately upon the death of the ancestor.

SAME.—Ancestral Personal Property.—Sale or Exchange.—Personal property coming to an intestate by "gift, devise or descent" has impressed upon it, under our statutes, the same ancestral quality as real estate coming to him in the same way; but in order to retain its ancestral character, it must remain and descend *in specie*; it must be the same article or personal property that came from the ancestor; and if it be sold or exchanged for other property, the money thus acquired for it, or the property acquired in exchange, is not impressed with the ancestral character of the original.

SAME.—Payment of Debts of Intestate with Ancestral Personal Property.—Ancestral personal property may be taken to pay debts in order to save ancestral real estate for another line of heirs, or to save non-ancestral real estate.

SAME.—Income of Ancestral Property.—Property in Custodia Legis.—Income derived from ancestral property does not partake of the character of such property so far as its descent is concerned; nor does personal property in the hands of a guardian, which has lost its identity with the original property which came into his possession, retain its ancestral character by reason of the fact that it is *in custodia legis*.

SAME.—Equity Following Property, Rule of not Applicable.—The rule that a court of equity will follow money or property into whatever form it may assume, for the purpose of upholding an equity, has no application to the devolution of property.

SAME.—History of Statute and Laws of Descent.—For a historical discussion of the statute and laws of descent, see opinion.

GUARDIAN.—Use of Principal to Pay Debts and Expenses.—It is the duty of a guardian to make the income of his ward's estate pay the expenses of such ward; but if necessary or for the interest of the ward, he may pay debts and expenses out of the principal where there is no income available for that purpose.

SAME.—Separate Accounts of Income and Principal.—While it is the duty of a guardian to make the income pay the expenses, yet the law does not require him to keep two separate and distinct funds, or to separate the income from the principal.

From the Montgomery Circuit Court.

B. Crane, A. B. Anderson, Thomas & Whittington, for appellant.

W. T. Brush and E. C. Snyder, for appellees.

Lotz, J.—The appellant, Mary A. Rountree, as ad-

ministratrix of the estate of Mary D. Gilkey, deceased, filed her petition in the Montgomery Circuit Court and asked the court to order a distribution of certain moneys in her hands to the persons lawfully entitled thereto. A day for the hearing of such petition was fixed and notice thereof duly issued. The appellee Essie Pursell appeared and filed an answer claiming to be entitled to a distributive share of said estate. The court tried the issues and made a special finding of the facts and stated conclusions of law thereon. .

The facts as found are, substantially, as follows:

Daniel Gilkey died testate in Montgomery county, Indiana, the 20th day of April, 1884. By the terms of his will he made certain specific bequests, and the residue of his property he devised and bequeathed to his daughter, Mary D. Gilkey, his only child. William P. Herron became the executor of the will, and as such executor he settled the estate in accordance with the terms of said will and was discharged from the trust June 25, 1885.

Mary D. Gilkey, the residuary devisee and legatee, was a minor, nine years of age, when Daniel Gilkey died. Samuel W. Austin was appointed and became her guardian May 8, 1884. As such guardian Austin received of Herron, executor, personal property of the ostensible value of \$25,229.86. Of this sum \$10,009 consisted of notes, accounts, judgments, and cash; \$7,000 of seventy shares of the capital stock of the First National Bank of Crawfordsville, Indiana, at its face value, and \$10,500 at its appraised value; \$4,700 of four per cent. United States Government bonds; \$20 of four shares of the capital stock of the Montgomery County Union Agricultural Society, of the face value of \$25 per share.

Some of the notes, accounts, and judgments were worthless, and the probable value of the whole personal

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estate received by the guardian was about \$21,000 or \$22,000.

Daniel Gilkey, at his death, owned real estate in Montgomery county, Indiana, of the probable value of \$15,000, which, by the terms of his will, went to Mary D. Gilkey, and she died the owner thereof by virtue of the devise.

The guardian of Mary D. Gilkey, prior to her death, collected all the notes, accounts, claims, demands and choses in action, which he had received from Herron, executor, except a few worthless and uncollectible claims which were of no value.

During the existence of the guardianship, the guardian, as such, collected and received large sums of money, as interest, the exact amount of which is unknown. He collected as dividends on bank stock large sums of money. He collected large sums of money as interest on United States bonds, and he sold the United States bonds for \$5,922, of which sum \$1,220 was premium, the amount received in excess of the face value of the bonds. He collected and received, as cash rents from the real estate, about \$6,000. He sold wheat, corn, hay and other personal property, raised on or taken from the real estate, and realized from such sales a large sum of money. He collected and received in cash from other sources about \$19,600.

The money received by Austin, as guardian, which was not received by him from Herron, executor, was money derived from the income of the estate of Mary D. Gilkey, his ward, and the personal estate received from the executor.

Samuel W. Austin kept an account of his receipts and expenditures, as guardian, in the First National Bank, of Crawfordsville, Indiana, in the name of his ward, Mary D. Gilkey. In this account Mary D. Gilkey

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was credited with all sums received by her guardian, and was charged with all sums expended on her account, and with loans made by him out of her funds.

The money so collected and received by Austin, as guardian, was commingled, and no separate account or memorandum was kept by which one part could be identified from the other. Much of it was re-invested in new loans to different parties, and new notes and obligations taken therefor, in the name of said guardian, from other persons than those who were originally indebted to the estate. Out of the moneys so collected and received, the expenses of the care, education and support of the ward and of the guardianship; the taxes of the real and personal estate of the ward, and various costs and expenses were paid.

Mary D. Gilkey died in Montgomery county, Indiana, August 2, 1892, intestate, and under the age of twenty-one years. September 17, 1892, Austin made his final settlement as guardian and paid into court as the balance of funds in his hands the sum of \$7,744.14 in cash, and turned over notes to the court to the amount of \$6,011, and also turned over to the court the seventy shares of the capital stock of the First National Bank, of Crawfordsville, Indiana, of the face value of \$7,000, and the four shares of stock of the Montgomery County Union Agricultural Society of the value of \$20.

The personal property and assets, turned over by the said Samuel W. Austin, as guardian, in his final settlement, were less in amount and value than came into his hands from said William P. Herron, executor, and the expenditures of the guardian, allowed by the court, exceeded the income, rents, dividends, and interest received by him from the real and personal estate of Mary D. Gilkey. The costs and expenses of the trust were greater than the income therefrom.

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Mary D. Gilkey died without issue and left, surviving her, neither father nor mother, brothers or sisters, or their descendants, but left surviving her a sister of Daniel Gilkey, deceased, and a number of descendants of his deceased brothers and sisters.

Julia Gilkey, the mother of said Mary D. Gilkey, died in November, 1876. The appellee, Essie Pursell, is the daughter of a deceased sister of Julia Gilkey, and is the owner, in her own right and by assignment, of the interest of all the heirs on the mother's side in the estate of Mary D. Gilkey."

Mary A. Rountree, as the administratrix, asked an order of court authorizing and directing her to distribute among the parties entitled thereto the sum of \$9,000, derived from the cash and assets turned over by Austin, as guardian, not including the bank stock or the stock of the agricultural association or any part of either.

The heirs of the paternal line claim that they are entitled to the whole of this sum, and that the heirs of the maternal line have no right to share in the distribution.

On the other hand, Essie Pursell claims that the heirs of the maternal line are entitled to take one-half the sum, and that she, as heir and as assignee of the interests of all the other heirs of the maternal line, is entitled to that half."

The court below, in its conclusions of law, decided in favor of Essie Pursell, and rendered judgment accordingly.

The appellants insist that the court erred in its conclusions of law.

The controversy in this case arises upon the construction of the statutes regulating the descent and distribution of estates of deceased persons, and particularly of the first subdivision of section 5 of the act approved May 14, 1852, being section 2626, Burns Rev. 1894, and sec-

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tion 2741, R. S. 1881. That act is entitled "An act regulating descents and apportionment of estates." The first five sections, being sections 2622 to 2626, Burns Rev. 1894 (sections 2467 to 2471, R. S. 1881), are as follows:

"1st. The real and personal property of any person dying intestate shall descend to his or her children in equal proportions; and posthumous children shall inherit equally with those born before the death of the ancestor.

"2d. If any children of such intestate shall have died intestate, leaving a child or children, such child or children shall inherit the share which would have descended to the father or mother; and grandchildren and more remote descendants and all other relatives of the intestate, whether lineal or collateral, shall inherit by the same rule: *Provided*, That if the intestate shall have left, at his death, grandchildren only, alive, they shall inherit equally.

"3d. If any intestate shall die without lawful issue or their descendants alive, one-half of the estate shall go to the father and mother of such intestate, as joint tenants, or, if either be dead, to the survivor, and the other half to the brothers and sisters and to the descendants of such as are dead, as tenants in common.

"4th. If there be neither father nor mother, the brothers and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common. If there be no brothers or sisters of the intestate or their descendants, the father and mother shall take the inheritance as joint-tenants; and if either be dead, the other shall take the estate.

"5th. If there be no person entitled to take the inheritance according to the preceding rules, it shall descend in the following order:

"First. If the inheritance came to the intestate by gift,

devise, or descent from the paternal line, it shall go to the paternal grandfather and grandmother, as joint tenants, and to the survivor of them; if neither of them be living, it shall go to the uncles and aunts in the paternal line, and their descendants, if any of them be dead; and if no such relatives be living, it shall go to the next of kin, in equal degree of consanguinity, among the paternal kindred; and if there be none of the paternal kindred entitled to take the inheritance as above provided, it shall go to the maternal kindred in the same order.

"Second. If the inheritance came to the intestate by gift, devise, or descent from the maternal line, it shall go to the maternal kindred in the same order; and if there be none of the maternal kindred entitled to take the inheritance, it shall go to the paternal kindred in the same order.

"Third. If the estate came to the intestate otherwise than by gift, devise, or descent, it shall be divided into two equal parts, one of which shall go the paternal and the other to the maternal kindred, in the order above described; and on the failure of either line, the other shall take the whole."

It is conceded that the property sought to be distributed did not come to Mary D. Gilkey by descent, but through the will of her father. The appellant contends that the property came to Mary by either gift or devise, and that the persons to whom it should be distributed must be determined by the same rule as applies to real estate under the same circumstances.

The appellees insist that the property did not come to Mary, either by gift or devise; that if it did it was never the intention of the Legislature to impart to personal property an ancestral character or quality; that in any

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event the original property given or devised has lost its identity and character by the many transformations which it has undergone.

Mary D. Gilkey died intestate, unmarried and without issue. The direct line of her father's blood became extinct with her. The devolution of the property of which she died seized or possessed, depends upon the manner of its acquisition and the sources of her title. If the property came to her by gift, devise, or descent, it must go to the persons designated in the first and second subdivisions of section 5 above set out. Strictly speaking, a gift is not a devise nor a devise a gift, and property which came by descent could not have come by either gift or devise. To give is to transfer the ownership of property from one person to another gratuitously, without an equivalent or consideration. A gift is the thing transferred. Delivery or placing the donee in possession of the thing given is one of the necessary elements of a valid gift. The word "gift" ordinarily applies to personal property only, but in its larger signification it applies to either realty or personalty.

The usual phrase of testamentary disposition is, "I give, devise and bequeath." The word "gift" is well adapted to such disposition for the ruling motive of the testator is to confer property rights upon another gratuitously and of his own free will. *Allen v. White*, 97 Mass. 504; Schouler on Wills, section 3. •

The word "devise" ordinarily relates to real estate acquired through a will. It is a gift by will of real estate, and can not, with legal precision, be applied to things personal. The appropriate term in disposing of personalty by will is "bequeath," and a bequest is a gift by will of personal property, but in order to favor the manifest intent of the testator, as shown by the context of

the will, the courts often construe the word "bequest" to mean "devise" and "devise" to mean "bequest."

The same rule prevails in the construction of statutes in reaching the legislative intent. The word descent ordinarily applies to the devolution of real estate. But all of these words and the phrase "gift, devise, or descent" may be so used as to indicate the manner of the devolution of both real and personal property, or of personalty alone.

This is well illustrated by section 2649, Burns Rev. 1894 (section 2488, R. S. 1881), where it is provided that "The personal property of the wife held by her at the time of her marriage, or acquired, during coverture, by descent, devise, or gift [or in any other manner], shall remain her own property to the same extent and under the same rules as her real estate so remains; and on the death of the husband before the wife * * *, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances." Personal property is the principal subject-matter of this section, and it clearly appears that the legislature contemplated that such property might be acquired by devise and by descent. The word "descend" ordinarily means to go down. An ancestor primarily means one who goes before: a progenitor. But in the law relating to the devolution of property rights, "descend" may mean "ascend," as "descending in the ascending line," and a son may be the ancestor of his father. There is much confusion of terms and of ideas. The Roman law of succession more properly describes the modern devolution of property than our terms of descent and distribution. Whilst these words may be wrenched from their usual acceptance, the power of the Legislature to give them another meaning can not be denied.

We are of the opinion that by the use of the term

"gift, devise or descent," it was the legislative intent to include all property, either real or personal, that came to the intestate without an equivalent or consideration being paid therefor. These terms embrace all the methods by which title to property can be legitimately acquired without giving an equivalent for the same. It is the destination of property thus acquired that is sought to be controlled by directing it back to the sources whence it came.

Mary D. Gilkey became the owner of the property as a gratuity, through her father's will, and it should all go to the paternal line unless some other causes exist which control its destination.

If the statutes of this State do not give to personal property an ancestral character, then it will not go to the paternal to the exclusion of the maternal line, although it came to the intestate by gift or devise. This presents the most important question in the controversy. In the first section above set out it is expressly provided that the real and personal property shall descend, and that posthumous children shall inherit. It is personal property as well as real that is the subject of the enactment. In the subsequent sections the terms "descend," "shall go to" and "inherit" are used synonymously.

The same is true of the words "estate" and "inheritance." The words "descend," "inherit" and "inheritance" ordinarily relate to real estate. The same is true of the terms "tenants in common" and "joint tenants." Whilst this is true it is in the power of the Legislature to give them a different inflection and to expand their meaning. The words "descend," "inherit," and "inheritance," in their broader meaning, are frequently applied to personal property. Whilst some confusion exists in the terms used, we think it clear that the enactment governs the descent of real estate as well as the

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distribution of personalty. This much is clear, that when personal property has reached that point when the law undertakes to divide it among the persons entitled to it, it shall be divided in the same manner and into the same parts, and to the same persons that real estate is divided when it descends. We have no other statute in this State regulating the distribution of the surplus of the estate of an intestate. And we have no other enactment regulating the descent of the real estate of an intestate. Descent and distribution are combined in the same act. These terms, which are peculiarly applicable to real estate, such as "joint tenants" and "tenants in common," may be construed to have their full force in so far as the act is a statute of descent, and inapplicable in so far as the act is one of distribution of personalty. It is no unusual thing in the history of the legislation of this State and country regulating the descent of realty and the distribution of personalty to combine both in the same act. Indeed, this is the most natural method considering the character of our people and our institutions. The ordinance of Congress, passed in 1787, governing the Northwest territory, of which Indiana then formed a part, regulating the disposition of the property of intestates, was both a statute of descent and of distribution, R. S. 1843, p. 20.

The same is true of the first law bearing upon this subject, passed by the first General Assembly after Indiana became an independent State. Acts 1816, p. 141.

The same combination is found in the act of January 2, 1817. Acts 1818, p. 183, R. S. 1824, p. 154, and in the act of January 29, 1831, R. S. 1831, p. 207, and also in the act of February 17, 1838, R. S. 1838, p. 236.

The first separation between the statutes of descent and distribution occurred in 1843.

In that year the descent of real estate, and the distribution of personal property were embraced in separate enactments. R. S. 1843, p. 432 and p. 552. This separation continued until the enactment of the present law in 1852, when they were again combined in one. It does not necessarily follow that because the succession to property rights in real and personal estate is commingled in the same act that an ancestral quality is given to each kind, although it must be conceded that such combination lends some support to the contention. In construing statutes, we must bear in mind the former laws both common and statutory, and we often find ourselves materially aided by approaching the subject from the side of history.

There is no branch of the law in which more conservatism is found than in that relating to the succession to property rights. Every change has been stubbornly resisted, and the present laws are the result of ages of slow and gradual development. It is not to be expected that a modern legislative body will disregard this conservative tendency. A brief allusion to the history of intestate succession may be of assistance. In ancient times, and among barbarous people, the family seems to have been the unit of society. The family was an entity something akin to the modern corporation. The father or patriarch was the head or ruler, and its members were bound together for mutual protection. No member of the family, not even the head, had any absolute right to property. It belonged to the family. Upon the death of the head or any member, the family succeeded to his property rights. As the family might adopt persons not of the same blood, blood relationship was not of controlling importance in the devolution of property. As society gradually advanced the rights of the individuals, composing the family, became more prominent, and the

later Romans undertook to regulate intestate succession by basing it largely upon blood relationship. Maine's Ancient Law Chap. V and VI, Hunter's Roman Law 649. The Roman laws applied to both real and personal property. The degrees of blood relationship as fixed by them form the basis of all modern legislation for the distribution of personal property. The feudal system introduced another theory for the devolution of lands and landed property, but it did not undertake to regulate the disposition of personal property. That system was founded upon military services, and sprang from the martial genius of its adherents. With some modifications it became the common law of descent in England. By it actual sezin or seizin in deed was indispensable to the inheritable quality of estates. If the ancestor was not seized no matter how clear his right of property the heir could not inherit.

According to the canons of descent hereditaments descended lineally, but could never ascend. This rule was applied so rigidly that it was said "the estate would rather escheat than violate the laws of gravitation." The oldest son was admitted to the inheritance to the exclusion of his brothers and sisters, and males before females. Lineal descendants *in infinitum* represented their ancestors, standing in the same place the ancestor would have stood if living; and on failure of lineal descendants the inheritance descended to the collateral relations—being of the blood of the first purchaser—subject to the preceding rules. The collateral heir of the intestate was required to be his collateral kinsman of the whole blood. In collateral inheritances the male stock was preferred to the female, and kindred of the blood of the male ancestor, however remote, was admitted before those of the blood of the female, however near, unless the lands in fact descended from a female. Watkins on

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Descents, 95. These canons of descent had two leading purposes in view, the first, to preserve the inheritance in the blood of that family by whom it was originally acquired; the second, to preserve the inheritance entire by keeping for the time being in a single representative of that family by which it was acquired. These rules tended to prevent the diffusion of landed property and to promote its accumulation in the hands of the few. In this manner a landed aristocracy was builded up. Rank and wealth became a bulwark of the throne and the king and aristocracy gave to each other mutual support.

After the separation of the American colonies from the mother country another system was introduced. It was equality before the law. Primogeniture was abolished. The elder son was no better than his brothers and males no better than females. It is this principle of equality that lies at the foundation of our civil institutions. The common law did not recognize any inheritable quality in personal property except as to heirlooms, and these, strictly speaking, were attached to the freehold. Heirlooms are not recognized by the laws of this country. 1 Wash. R. P. 19.

The English statutes of distribution were molded largely upon the Roman law of succession. These statutes governing the distribution of personal property (29 Can. 11, and 1 Jac. 11) were taken for the basis of the laws of descent, as well as distribution, by the various States after the separation from the mother country. Whilst some of the principles of the canons of descent are found in our statutes, the pervading spirit is derived from the statutes of distribution. By the common law, an ancestral quality was only given to something that was fixed and permanent and the identity of which could always be determined. The thing that descended always descended *in specie*. The stability of lands is fixed by

the laws of nature. Their owners may come and go with each generation, but their identity is preserved through all the ages. But personal property is unstable. It may change its forms many times in the hands of the same owner. It may be consumed and destroyed. Its identity is easily lost. At common law, it did not descend like real estate to the heir, but went to the personal representative of the deceased. This rule has been modified to a limited extent by force of our statutes. The heir has title and interest in the personal estate before the appointment of an executor or administrator, subject to be divested by such appointment. *Coldron v. Rhode, Admr.*, 7 Ind. 151; *Hutson, Admr., v. Merrifield, Admr.*, 51 Ind. 24 (30).

At common law, an heir is one upon whom the law casts estate in lands immediately upon the death of the ancestor. Under our statute an heir is one who succeeds to the estate, both real and personal, immediately upon the death of the ancestor. The administrator, under the statute, is a mere trustee for the creditors and heirs of the intestate. If the personal property is not needed to pay debts, the heirs may distribute it among themselves without formal administration. The title they take they derive in the same manner as the title they acquire to the real estate of the deceased. They take title in both instances by force of the statute, and it matters not whether it be called descent or succession. *Brown, Exr., v. Critchell*, 110 Ind. 31 (36); *Humphries, Admr., v. Davis*, 100 Ind. 369 (372); *Bowen v. Stewart, Admr.*, 128 Ind. 507 (515).

Personal property, as well as real estate, does descend and has an inheritable quality. Our statute does follow the common law to the extent that it recognizes the superior claims of blood relationship in the descent of real estate. The blood of the ancestor that acquired the prop-

erty is preferred in the descent from the intestate. There is a sense of justice and equity in this rule. The blood descendants of him who acquired it should have superiority over those who are not of his blood. Recognizing the difficulty in tracing title, and the many conflicting claims that might arise, the later rule of the common law did not attempt to go beyond the immediate ancestor of the intestate. *Gardner v. Collins*, 2 Pet. 58; *Murphy v. Henry*, 35 Ind. 442.

The source of the title while the property was in the intestate imparts to it certain characteristics. If it came to the intestate by gift, devise or descent from the immediate ancestor, we may denominate this quality ancestral, and that is what is meant by the use we make of this term. Both real and personal property may have inheritable qualities and may descend to the heir and still have no ancestral quality.

In support of their position that the Legislature intended to give to personal property an ancestral quality counsel for appellant makes use of the following argument:

"Real estate was the favorite of the common law, which took but little account of personal property. It is a well known historical fact that personal property constituted but a small, a very small, part of the estates of the landed aristocracy and nobles of England when the common law ruled supreme. It is only in comparatively modern times that personal property has increased in amount and value to such extent that it now equals, if it does not surpass, real property. Stocks and corporate bonds, which formed but a small fraction of the wealth of the country seventy-five or a hundred years ago, now amount to hundreds of millions and compose estates which, in value of principal and income, rival that of the estates of princes and nobles of a few hun-

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dred years ago. Of so little consequence was personal property that at the common law the husband had the right to dispose of all his personal property by will, and thus deprive his widow of any share thereof. Until recently the only restriction placed upon the husband's right to dispose of his personal property by will was the right of his widow to \$500 out of the first moneys received by the executor or administrator. But, recognizing the fact that many fortunes of great value consisted solely of personal property, the Legislature of 1891 gave the widow of a man dying testate the same interest in his personalty that she has in his real estate."

There can be no doubt of the right and power of the Legislature to impart to personal property an ancestral quality. But the question here is not one of power. It is to determine what power the Legislature has exercised. Statutes are to be construed as forming a part of one system of jurisprudence. All statutes bearing upon the same subject-matter should be considered in attempting to ascertain the legislative intent. The court must presume that the Legislature, in enacting laws on any given subject intended to establish a uniform and harmonious system and in construing statutes, will endeavor to bring about such result.

The statutes regulating the settlement of the estates of deceased persons make the personal property the primary fund for the payment of debts. It is required to be marshalled and exhausted that the realty may be saved to the heirs. It is easy to conceive how much confusion, and, perhaps, injustice, might result if such a construction be adopted as to give to personal property an ancestral quality. Counsel for appellee put the objection to such construction with much pith and force, as follows:

"Personal property is constantly changing, perishing,

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being turned into property of a different kind, invested, reinvested, added to and taken from, so that in a few years, as a rule, its identity is lost. Suppose that personal property is received by 'gift, devise or descent' from two persons, that there are debts to pay and the property is sold to pay debts, and there is a surplus after the payment of debts, how is the surplus to be divided? No law requires an administrator to keep an account of how much came from one source or the other. How will the surplus be divided? If the property derived from one source is real estate and from the other it is personal property, and it takes all the personal property to pay the debts, greater in amount than the value of the real estate, does not the law require the administrator to exhaust the personal estate before he will be permitted to sell the real estate? And, would it not follow in such a case that the line from which the personal estate came would get nothing, and that that line would have to give up its ancestral estate in order to save to the other line the real estate? But if both real and personal stand upon the same footing, why should the one line take nothing and the other all?

"Again, suppose that one dies seized of real estate, which he acquired by purchase, no part of which came to him by 'gift, devise or descent,' of the value of ten thousand dollars. He dies the owner also of personal property of the value of ten thousand dollars, which came to him by 'gift,' or 'devise' or 'descent.' He died owing debts amounting to ten thousand dollars. Is it not the duty of the administrator to pay this indebtedness with the personal estate? * * The statute for the settlement of decedents' estates makes it so. But if personal property so acquired is ancestral estate, it would be doing a great injustice to the line from which it came to so apply it, if appellant's position is correct."

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There are other patent objections that are made against giving personal property an ancestral quality. In *Jenks v. Trowbridge*, 48 Mich. 94, it is said:

"We may next inquire whether the Legislature could have purposed that all movables should be liable to be impressed with the character of ancestral estate; because if that was the purpose as to any it was the purpose as to all. The provision will not permit any distinction. Without urging the point that if such had been the intention it would presumably have been declared in explicit terms and not been left in any uncertainty, the attention is directed to the nature, uses, and modes of handling such property and its vicissitudes of ownership as affording reason for thinking it was not meant to consider it as suitable to be classed in the category of ancestral estate. In all its forms it is subject to constant changes. At a given moment it may be in one thing and at the next in another. Transformations may ensue through buying, selling, exchanging, intermixing, or by accident, or through some other cause. It may exist in money or in something else resembling money. The particular form may be utterly destitute of stability or substantially incapable of specific identification. Yet the period for which the character of ancestral property may be retained may exceed twenty years.

"The general rule is that distributive rights are not affected by antecedent circumstances connected with the decedent's source of acquisition, but depend on the state of things at his death.

"It is not to be supposed that property so mutable and so difficult to be identified and traced out, as some at least to which the principle must apply, if it apply to any, was intended to be brought within the rule governing ancestral estates."

In the case of *Kelly's Heirs v. McGuire*, 15 Ark. 555, where this question arose, this language was used:

"There are other reasons for the exclusion equally cogent. Personal property is movable from place to place, exists to-day and perishes tomorrow; while land remains the same, although the ownership may change with the seasons. In view of this difference and out of deference to the common law, it is reasonable to suppose that the statute never designed to embrace personal property throughout. If so, inquiry would have to be made as to ancestral and newly acquired property, which, in many instances, could hardly be satisfactorily done, and, in some, not at all: and the litigation that would spring up from such a prolific source, would be truly alarming. Families would be plunged into open hostility with each other; the ties of blood and kindred severed, and the peace and quietude of domestic life disturbed by an unworthy scramble for property. When the administrator proceeds to make distribution of the moneys in his hands, would it not be truly absurd to talk about ancestral and newly acquired estates? From the very nature of the thing, would it not be almost, or quite, impossible to ascertain the facts, or apply such a rule?"

A similar conclusion was reached in *Cramer's Appeal*, 43 Wis. 167.

The difficulties here portrayed should have due consideration before reaching the conclusion that personal property has an ancestral quality. Appellant's counsel make the argument that because it may be difficult to construe and apply the law is no sufficient reason to refuse to execute it; and that because in some cases it may be difficult to trace out the sources of title and enforce the statute, is not a sufficient reason to deny the existence of the law. Whilst this is true, the difficulties which

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would arise are so many reasons against such construction.

Our statutes governing the descent and distribution of property differs in some respects from those of Michigan, Arkansas and Wisconsin.

We have another statute relating to descent and distribution, the act of March 2, 1883; Burns Rev. 1894, section 837, concerning the adoption of children. It is in these words: "Such court, when satisfied that it will be for the interest of such child, shall make an order that such child be adopted, and from and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother: *Provided, however,* That should such adopted child die intestate, without leaving wife or husband, issue or their descendants, surviving him or her, seized of any real estate or owning any personal property which may have come to such child by gift, devise or descent from such adopting father or mother, such property so coming to such adopted child shall, on its death, descend to the heirs of said adopting father or mother the same as if such child had never been adopted."

This statute, although it is found among those relating to the adoption of heirs, is as much a statute of descent as if found under that classification. The estate of an adopted child who dies intestate and without issue must be settled by the law governing decedent's estates. If the property came to the child by gift, devise or descent, from the adopting parent, the remainder after the payment of debts must go to the heirs of the adopting parent. It applies to personal estate as well as realty. It was clearly the intention of the legislature in this in-

stance to impart to personal property an ancestral quality. Or, in other words, it is required to go back to the sources from whence it came.

Every objection that is made against construing the other statutes so as to give personalty an ancestral character can be made against this statute. The same difficulties arise in its application and enforcement. Personal property which came to the intestate by gift, devise or descent, may, under this statute, be taken to pay debts in order to save ancestral real estate for another line of heirs, or to save non-ancestral real estate. This statute is too clear to admit of doubt; too plain to admit of construction. It says that personal property shall go back to the sources from whence it came. If the Legislature intended in this instance to impress an ancestral quality upon personal property, there is strong reason for holding that it intended to do so in the instances where it is said that real and personal property shall descend in the same manner. However unjust it may seem to take ancestral personal property and exhaust it in paying debts to save the realty to another line of heirs, it is certainly in the power of the Legislature to require it to be done.

We have somewhat reluctantly reached the conclusion that it was the legislative intent in the distribution of personal property to have a regard for the line of blood from which it came. There may be cases where hardships and seeming injustice result, but many intestates leave large personal estates with few debts.

The heirs may make division among themselves upon the lines adopted by the law, and if any part of the personalty is ancestral it may so descend, or be divided. Personal property, like real estate, in order to retain its ancestral character, must remain and descend *in specie*. It must be the same thing that came from the ancestor; the same parcel of real estate; the same article of per-

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sonal property. If real estate which descends to the heir be exchanged for other real estate or sold, and its proceeds invested in other real estate, the newly acquired realty loses its ancestral quality. *Armington v. Armington*, 28 Ind. 74; *Murphy v. Henry*, *supra*; *Abshire v. State, ex rel.*, 53 Ind. 64; *Henson, Admr., v. Ott*, 7 Ind. 512. The same rule applies with equal if not greater force to personal property.

The personal property of Daniel Gilkey has undergone many transformations since it left his ownership. None of it remains in the same condition as when it left his possession and ownership except the seventy shares of bank stock, and the four shares of stock in the agricultural society. The appellant, however, contends that all the personal property ever since it left the hand of Daniel Gilkey has been in custody of the law, being first in the hands of the executor, then of the guardian, and lastly of the administrator; that Mary D. Gilkey never exercised any control over it, and that her will never operated upon it to change its form; that whatever changes have been made were made by the officer of the court; that the property must be treated as a trust, and still impressed with the same qualities which it had when the title first came to her. It is true that property in the hands of an executor, administrator or guardian, is in a certain sense *in custodia legis*. *Turner v. Flagg, Guar.*, 6 Ind. App. 563 (569).

Such property is not subject to levy and sale on execution. Freeman Executions, section 131. It is the duty of a guardian to manage the property in his hands to the best interest of his ward, and in proper cases to maintain and educate his ward. He should, if possible, make the income pay the expenses, but the law does not require that he shall keep two separate and distinct funds

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or to separate the income from the principal. If it be to the best interest of the ward, he may pay debts and expenses out of the principal when there is no income available for that purpose.

He can not discharge the duties enjoined upon him by statute unless he is permitted to exercise, in a measure, his own judgment and discretion. Within the sphere of his duty, the powers of the guardian are no less than those of the absolute owner of the property. For the time being the law is substituted for the will of the beneficiary, and whatever the law requires to be done or whatever changes are necessarily made in the personal property, they stand upon the same footing as if they had been made by the owner. There is no finding here that the guardian was guilty of any breach of trust or failed to do his duty in any respect. The presumption must prevail that he managed the estate properly and as the law directs. The rents of the real estate and the income from the personalty became the absolute property of the ward, no matter what quality the law impressed upon the original property. The rents of the realty and the income from the personalty have been so commingled with the principal that it is impossible to distinguish one from the other. The costs and expenses of the guardianship were greater than the income. The money sought to be distributed is not the same property that went into the hands of the executor or guardian. It has lost its identity, and with it its ancestral quality.

There are cases where a court of equity will follow land or even money in whatever form it may assume for the purpose of upholding an equity, but this doctrine does not apply to the devolution of property. *Armington v. Armington, supra.*

The court did not err in holding that one-half of it went to the paternal and one-half to the maternal line.

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As to the bank stock and the shares in the agricultural society, we do not consider that their distribution is necessarily involved in this proceeding.

The opinion given is done at the request of counsel, and in order to facilitate the settlement of the estate. This property, still retaining the same form as when it left the ownership of Daniel Gilkey, it goes to the paternal line to the exclusion of the maternal line. It is expressly provided by statute in this State, Burns R. S. 1894, section 2434 (R. S. 1881, section 2279), that stock in corporations shall not be sold except on the order of the court, but shall be distributed to the persons entitled thereto.

Judgment affirmed.

Filed Feb. 8, 1895.

No. 1,349.

**THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. BECKETT.**

RAILROAD.—Reduced Fare for Passengers Purchasing Tickets.—Facilities to Obtain Tickets.—A railway company may require passengers to procure tickets, or, upon failure to do so, to pay the regular fare, and not the reduced ticket fare; but it must provide proper facilities to enable the passengers to purchase such tickets.

SAME.—Failure to Furnish Facilities to Purchase Ticket.—Before a railway company can demand of a passenger more than the regular ticket fare, it must furnish facilities to such passenger for the purchase of a ticket at the place where he enters the cars; and if he is not furnished such facilities, or is refused a ticket, he may enter the car and tender only the regular ticket fare.

SAME.—Wrongful Act of Servant Acting Under Rules of Company.—A railway company can not justify its own wrongful conduct by the fact that the servants were acting according to its directions or rules.

PRACTICE.—Excessive Damages.—Remittitur.—The trial court may, if it considers the damages excessive in an action of tort, in the exercise of a sound discretion, permit the plaintiff to elect whether he will remit part of the damages or suffer a new trial. If the remittitur is made, the question of excessive damages, as they stand after entering the remittitur, may still be considered on appeal.

From the Morgan Circuit Court.

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B. K. Elliott and *W. F. Elliott*, for appellant.

W. L. Beckett and *W. S. Doan*, for appellee.

GAVIN, J.—The appellee's complaint sets forth, in substance, that on July 20, 1892, appellant had a station at Massachusetts avenue, in Indianapolis, where it had on sale round trip tickets to Jonesboro, a station on another division of its road, at the regularly advertised price of \$3.60; that appellee, desiring to go to Jonesboro, presented himself in ample time at appellant's ticket office, tendered the price and asked for such a ticket, but failed to obtain it by reason of the incapacity and negligence of the agent, who advised him to get on the train without it; that in pursuance of this direction, he boarded the train, explained to the conductor how he came to be without a ticket and tendered to the conductor the regular round trip fare to Jonesboro, \$3.60, but he refused it and demanded \$3.80, upon failure to pay which, appellee was wrongfully, maliciously and in a rude, angry and insolent manner ejected from the train, whereby he was compelled to walk back a long distance, greatly humiliated, damaged, etc.

To this complaint appellant filed, first, a general denial, and second an affirmative answer setting up that Jonesboro was on a division of appellant's road different from that on which the Massachusetts avenue depot was located; that the trainmen did not run through from Massachusetts avenue to Jonesboro, but new men would take charge of appellee at an intermediate station on his journey; that no conductor or trainman on the train which started from Massachusetts avenue had any authority to accept a round trip cash fare or sell round trip tickets to Jonesboro, but this was forbidden by appellant's rules, as appellee well knew; that to enable a passenger to obtain the benefit of the \$3.60 rate, under

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the rules of the company, a ticket was necessary, and that when without a ticket the regular fare was ten cents extra each way, as appellee knew; that he did not tender this extra sum, nor did he tender a one way fare, nor any other sum than the \$3.60 named, which was expressly conditioned upon his being carried the round trip.

To this second paragraph of answer a demurrer was sustained.

It is urged by appellant's learned counsel that this answer is good because it appears from it that the conductor had no authority to collect or receive a round trip fare, which was all that was tendered him, and because he was not bound to take the passenger's statement as to his inability to obtain a ticket.

Whatever may be the rule in some jurisdictions, we are of opinion that the law is well settled in Indiana adverse to appellant's position.

The railroad company clearly has a right to require passengers to procure tickets, or, upon failure to so do, to pay the regular fare, and not the reduced ticket fare, provided proper facilities are given to enable the passengers to purchase such tickets. *Sage v. Evansville, etc., R. W. Co.*, 134 Ind. 100.

But the furnishing of such facilities is a prerequisite to the right to demand such excess over the ticket fare, and where the opportunity is not given the passenger to procure a ticket, and his application therefor is without just cause refused, and he without fault boards the train without such ticket, he will, upon tender of the ticket fare, be entitled to all of the rights and privileges that a ticket would afford him. *Chicago, etc., R. R. Co. v. Graham*, 3 Ind. App. 28; *Lake Erie, etc., R. W. Co. v. Close*, 5 Ind. App. 444; *Jeffersonville, etc., R. R. Co. v. Rogers*, 28 Ind. 1; *Indianapolis, etc., R. W. Co. v. Rin-*

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ard, 46 Ind. 293; *St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566; *Stoner v. Pennsylvania Co.*, 98 Ind. 384. .

Although the conductor may be acting strictly according to the rules of the company, and doing that and only that which, under its rules, he is authorized to do, it by no means follows that his conduct is right toward the passenger. Between himself and the company its rules will justify the conductor, but not so as between himself as the company's representative and the passenger.

In the well considered case of *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381, the passenger presented upon his return trip the going coupon of a round trip ticket, which, upon its face, did not entitle him to the passage, yet, it having been given to him by the company's servant by mistake upon the first trip, he detaching the wrong coupon, the court held that upon explanation of these facts to the conductor the passenger was entitled to ride upon it.

So, too, in *Pennsylvania Co. v. Bray*, 125 Ind. 229, it was held that under such circumstances the conductor must heed the explanation of the passenger, or if he refuses to do so it is at the peril of the company to respond in damages if the passenger be in the right.

The first wrong was by appellant in failing to furnish appellee a ticket upon his reasonable demand therefor, and it must answer for all the consequences naturally following from that wrong.

The company can not be permitted to justify its own wrongful conduct by the fact that its servants were acting according to its directions or rules. *Cherry v. Kansas City, etc., R. W. Co.*, 52 Mo. App. 499; *Kansas City, etc., R. R. Co. v. Riley*, 68 Miss. 765; *Appleby v. St. Paul, etc., City R. W. Co.*, 55 N. W. Rep. 1117; *Muckle v. Rochester R. W. Co.*, 79 Hun 32; *Missouri, etc., R.*

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W. Co. v. Martino, 18 S. W. Rep. 1066; *Texas, etc., R. W. Co. v. Dennis*, 23 S. W. Rep. 400; *Georgia R. W. Co. v. Dougherty*, 86 Ga. 744.

Under these authorities, we are of opinion that it was the duty of the company either to provide appellee an opportunity to obtain a ticket or to make some provision by which he could pay his fare at the ticket rate upon the train. Neither was done, but he was ejected for his refusal to pay to the conductor the amount demanded, which was in excess of the ticket fare. This demand was wrongful and the passenger's expulsion for refusal to comply with it was also wrongful.

Counsel seek to distinguish this case from the case of *Chicago, etc., R. R. Co. v. Graham, supra*, by the fact that the conductor here went only part of the way to Jonesboro, and was not authorized to accept the round trip fare. We are unable to see any distinction in principle. In this instance the passenger asked the conductor to do something which the rules of the company forbade him to do. So, also, in cases cited where the passenger tendered less than the regular cash fare or a ticket which, on its face, did not entitle the holder to the passage demanded, in all these cases the passenger asked and was held entitled to that which the company's rules prohibited. The company could easily have provided for such cases by authorizing the conductor to issue a special check entitling the passenger to the round trip. Not having done so, it can not hide behind its failure to make reasonable provision for such a contingency.

As stated by counsel, the views of the court as to the sufficiency of the answer were adhered to in its instructions, evidence as to all the matters pleaded by the answer being received under the general denial. It is not necessary for us to consider the instructions in detail. The views of the law which we have already expressed

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sufficiently dispose of those given and of the third, fourth and fifth instructions asked, which are the only ones of those asked to which counsel refer in argument.

Some exception is taken to the rule laid down by the court to ascertain the compensatory damages. The language of the trial court, however, strictly follows the cases of *Chicago, etc., R. R. Co. v. Holdridge*, 118 Ind. 281; *Lake Erie, etc., R. W. Co. v. Fix*, *supra*; *Taber v. Hutson*, 5 Ind. 322.

The jury returned a verdict for \$1,000 in favor of the appellee, of which he was required by the court to remit \$500 or submit to a new trial.

It is insisted here that the damages were excessive and that in considering this question we should regard only the original amount of the verdict and not the reduced amount, because the court had no right to permit a remittitur in an action of this kind. In this view of the law we can not concur. Counsel rely upon the statement made in *Terre Haute, etc., R. W. Co. v. Jarvis*, 9 Ind. App. 438.

The court was there considering not a question of excessive damages, under a motion for new trial, but the effect of the exclusion of evidence and the power of the court to cure the error in that case by a remittitur. The language used should, of course, be limited and applied to the question under consideration.

Without reference, however, to this distinction the case and the authority upon which it is based does not purport to deal with the principle governing the trial court, but only with that which holds good in the appellate tribunal.

The right of the trial court to direct or permit a remission of a part of a verdict in cases where there is no definite standard by which to measure the damages, seems not to have been definitely determined in our State.

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In *Cromwell v. Wilkinson*, 18 Ind. 365, Judge PERKINS expressed the opinion that such a remittitur would not aid the verdict, but that if too large as returned, a new trial should be granted. In the subsequent case of *Carmichael v. Shiel*, 21 Ind. 66, the same learned judge withdrew this holding and expressly left the question open for future consideration.

We have not been referred by counsel on either side to any Indiana case touching the proposition.

While there is some conflict of authority, the great preponderance of the decisions appears to favor the right of the courts to direct conditionally the remission of a part of the damages in such cases where they deem them excessive.

In the following, among others, the remittitur was ordered or permitted by the trial court, and its action held to be an appropriate exercise of its powers. *Chicago, etc., R. W. Co. v. Des Lauriers*, 40 Ill. App. 654; *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Corcoran v. Harran*, 55 Wis. 120; *Doyle v. Dixon*, 97 Mass. 208; *Craig v. Cook*, 28 Minn. 232; *Hall v. Chicago, etc., R. R. Co.*, 46 Minn. 439; *Little Rock, etc., R. W. Co. v. Barker*, 39 Ark. 491; *Blunt v. Little*, 3 Mason 102.

In other cases the order has been made even by the appellate court. *Kinsey v. Wallace*, 36 Cal. 462; *Collins v. City of Council Bluffs*, 32 Iowa, 324; *Lombard v. Chicago, etc., R. Co.*, 47 Iowa, 494; *Kennon v. Gilmer*, 5 Mont. 257; *Murray v. Hudson, etc., R. R. Co.*, 47 Barb. 196; *Howard v. Grover*, 28 Me. 97.

In Elliott's App. Proced., section 572, it is said: "We do not assert that the appellate tribunal may not require the successful party to elect to enter a remittitur or suffer a reversal, for that we believe may be done in any case, but we do assert that the appellate tribunal can not in ordinary cases of recoveries for personal injuries, or

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the like, where an assessment of damages is made in gross, deny an election and absolutely direct what the recovery shall be."

While we think it true that in such cases no court has the right to say absolutely what the damages shall be, we are unable to see any good reason why the trial court may not, if it believe the verdict right except as to the amount, in the exercise of a sound discretion, permit the plaintiff to elect whether he will remit part of the damages or suffer a new trial, and if the remittitur is made the question then is whether or not the damages thus reduced are excessive.

While the amount of damages allowed seems to us quite large, we can not hold it excessive under the rule firmly established by our cases, some of which assert that we can not interfere upon this ground unless the amount is "so outrageous as to strike every one with its enormity and injustice, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption." *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Toledo, etc., R. W. Co. v. McDonough*, 53 Ind. 289; *Lake Erie, etc., R. W. Co. v. Fix, supra*; *Pittsburgh, etc., R. W. Co. v. Hennigh*, 39 Ind. 509; *Lake Erie, etc., R. W. Co. v. Arnold*, 8 Ind. App. 297, and cases there cited.

Whether or not the negligent conduct of appellee, after his expulsion, was responsible for a portion of his injury, was for the jury to determine. *Pittsburgh, etc., R. W. Co. v. Klitch*, 11 Ind. App. 290, and cases cited.

There was no material error in refusing to permit proof that appellant had round trip tickets on sale at Brightwood, and that the train stopped there long enough for appellee to procure a ticket. It does not appear from the evidence offered or given that appellant knew how long the train would stop there, and that he could procure

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such a ticket there. Whether or not he would even then have been under any more obligation to leave the train and get such a ticket than the appellant's servants were to obtain one for him, we do not undertake to decide. It is enough to say that the evidence, even if admitted, would not have aided appellant.

After a careful consideration of all the points advanced by appellant's learned counsel, we find no sufficient cause for reversal.

Judgment affirmed.

Ross, C. J., dissents.

Filed Jan. 17, 1895.

No. 1,415.

VORIS v. HARSHBARGER, ADMINISTRATOR.

PROMISSORY NOTE.—*Want of Consideration, Answer.*—In an action on a promissory note, negotiable by the law merchant, by an assignee before maturity, an answer which only avers that the note was executed without consideration is not sufficient. To make such answer sufficient, it should be averred that the plaintiff was not a *bona fide* purchaser for value.

SAME.—*Maker of Unsound Mind, Answer.*—*Indorsee.*—*Guardian.*—In an action on such a promissory note, an answer that the maker, at the time of its execution, was a person of unsound mind, constitutes a good defense, even as against a *bona fide* indorsee for value without notice of such unsoundness of mind. Such a defense may be made by the guardian of the maker, appointed after the note is executed.

INSANITY.—*Suit to Annul Contract.*—*Disaffirmance.*—When an action is brought by or on behalf of a person of unsound mind to rescind a contract, or recover property received under it from such person, it must be averred that the unsoundness of mind continued, and a disaffirmance before suit by his representative, or that after restoration to reason there was a disaffirmance of the contract by the plaintiff.

SAME.—*Return of Consideration.*—*Disaffirmance.*—If a person of appar-

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ent soundness of mind, not judicially declared to be insane, disaffirms a fair contract, he must restore the consideration and place the opposite party *in statu quo*, when such party did not know of the insanity and acted in a *bona fide* manner; and if he can not restore the consideration the contract can not be disaffirmed.

SAME.—*Necessaries*.—A lunatic is liable for the value of necessities furnished him, and, possibly, even on a note given therefor.

From the Montgomery Circuit Court.

G. W. Paul and M. W. Bruner, for appellant.

P. S. Kennedy and S. C. Kennedy, for appellee.

DAVIS, J.—Appellant filed in the court below, on the 11th day of December, 1893, a claim against the estate of said Daniel Arnold, deceased, founded on a note executed by said Arnold to one Buckley, on the 16th day of December, 1892, for two hundred dollars, payable in one hundred and eighty days at a bank in this State, which, before maturity, was indorsed by the payee to appellant.

The first paragraph of the answer was that at the time said Daniel Arnold executed the note he was a person of unsound mind and incapable of transacting business, and that said note was wholly without consideration. A demurrer to this answer was overruled and proper exception reserved. This ruling is the basis of one of the errors assigned.

In an action by an indorsee before maturity, on a note negotiable by the law merchant, an answer is not sufficient which avers only that it was executed without consideration. *Galvin, Admr., v. Meridian Nat'l Bank*, 129 Ind. 439.; *First Nat'l Bank v. Ruhl*, 122 Ind. 279.

In order to constitute a good defense on the ground that the note was executed without consideration, the answer, in such case, should aver that the plaintiff was not a purchaser for value in good faith.

In an action on a note, an answer that the maker, at the time of its execution, was a person of unsound mind

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constituted a good defense. *Reinskopf v. Rogge*, 37 Ind. 207; *Wilder v. Weakley's Estate*, 34 Ind. 181; *Copenrath v. Kienby*, 83 Ind. 18; *Musselman v. Cravens*, 47 Ind. 1.

This rule applies where, as in this case so far as disclosed by the complaint and answer, the contract is wholly executory. *Fay v. Burditt*, 81 Ind. 433.

The purchaser of commercial paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture and unsoundness of mind. *McClain, Guar., v. Davis*, 77 Ind. 419.

The general rule applicable in actions brought against persons of unsound mind is stated in *Hull v. Louth, Guar.*, 109 Ind. 315, as follows: "When persons of unsound mind are brought into court by a suit to enforce contracts made by them it will not do to hold that they may not, by their guardian, make the defense that, when the contract was made, they were of unsound mind."

When the action is brought by or in behalf of a person of unsound mind, a different rule has been recognized. In such actions it is necessary to aver that the insanity continued, and disaffirmance before suit by the guardian or representative of the person of unsound mind, or that after restoration to reason there was a disaffirmance of the contract by the person. *Hardenbrook v. Sherwood, Guar.*, 72 Ind. 403; *Louisville, etc., R. W. Co. v. Herr*, 135 Ind. 591.

The answer was sufficient.

The second paragraph of the reply to the first paragraph of the answer alleged in substance that Daniel Arnold, at the time he executed the note, was not possessed of a high order of intellect, but that he was, and had been, for thirty years engaged in transacting a large and profitable business, in the same neighborhood, under his own management and with such mind as he had when he executed the note; that he had accumulated a large

amount of money and property, and that he received full value for the note and used the consideration so received in his lifetime, well understanding the whole transaction and never attempted or offered to rescind or disaffirm said contract, and that he never was, at any time, adjudged to be a person of unsound mind, and that he was never considered a person of unsound mind by his family or friends.

The court sustained a demurrer to this paragraph of reply. This ruling is properly assigned as error.

In *Reinskopf v. Rogge, supra*; the answer was that the decedent, when he executed the note, was so intoxicated as to be incapable of executing the same.

The reply was that the note was executed for a stock of merchant tailoring goods, sold by appellants to said Rudolph Rogge in his lifetime; that they were delivered to him and he used the same, and that neither he nor his representative returned or offered to return the same or any part thereof to appellant. The court held the reply insufficient.

In *Wilder v. Weakley's Estate, supra*, which was an action on an account, it was alleged in the reply, that at the time of the sale and delivery of the goods the plaintiff had no knowledge of any insanity or mental imbecility of said Thomas Weakley, and in other respects the reply was in substance the same as in *Reinskopf v. Rogge, supra*.

The reply was held sufficient. The court said: "We think it may be safely stated, both on principle and authority, that where a person apparently of sound mind, and not known to be otherwise, and who has not been found to be otherwise by proper proceedings for that purpose, fairly and *bona fide* purchases property, and receives and uses the same, whereby the contract of purchase becomes so far executed that the parties can not be

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placed *in statu quo*, such contract can not afterwards be set aside, or payment for the goods be refused, either by the alleged lunatic or his representatives."

In *Boyer v. Berryman*, 123 Ind. 451, the court says: "It is now settled by our decisions that a deed of a person of unsound mind, made before office found, to one who has no knowledge of the grantor's incapacity is only voidable, and that, in order to avoid it, the consideration received must be tendered to the grantee."

In *Louisville, etc., R. W. Co. v. Herr*, *supra*, it was held that knowledge did not change the rule on the question of disaffirmance.

In *Nichol v. Thomas*, 53 Ind. 42, it was held necessary to disaffirm the contract, but that it was not necessary, in that case, to restore the consideration.

In *Fay v. Burditt*, *supra*, appellant brought an action for the wrongful taking and detention of personal property, alleging that appellee detained the same under color of a pretended chattel mortgage, executed by him when he was of unsound mind and wholly incapable of understanding the transaction; that appellee knew he was then utterly insane; that he had, at the time of the commencement of the suit, so far recovered the use of his mental faculties as to be able to comprehend the ordinary affairs of life and to make contracts and prosecute the suit in his own behalf; that the mortgage and note secured thereby were executed without any consideration whatever.

It was alleged, in the answer, that appellee was ignorant of the fact that appellant was of unsound mind when he executed the note and mortgage; that, at the time, appellant appeared to be rational and competent to transact ordinary business; that appellee had known him for five years, and during all that time his soundness of mind was not questioned to appellee's knowledge until a short

time prior to bringing the suit; that said note and mortgage were executed for a balance due appellee from appellant of unpaid rent for a good farm of sixty-five acres; that appellant was a farmer and had always pursued that business for the support of himself and family, and the use and occupation of farm land was to him a necessity; that in all of appellee's transactions with him, he acted in good faith, and appellant having had full enjoyment of the lease for the time specifically mentioned in the answer, the parties can not now be placed *in statu quo*.

The court said: "Upon these facts, it seems clear, upon authority as well as reason, that the plaintiff was not entitled to recover. It is now the well settled doctrine of this court, that the contracts of the unsound in mind, whose incapacity has not been judicially determined, are not void, but only voidable, and may, upon the removal of the disability, or by the act of a lawfully appointed guardian, be disaffirmed or ratified."

The court also said, in the case last cited: "If determined upon principle, it would seem that if the other party to the contract entered into it in good faith and without notice of the incapacity, and the contract itself was fair, either an actual restoration would be necessary, or, if that had become impossible, a just compensation instead; and if neither restoration nor fair compensation could be accomplished, then, under the rule already stated, a disaffirmance would not be permitted."

In *Woods v. Brown, Guard.*, 93 Ind. 164, the court says: "Those of unsound mind are liable on their contracts for necessities; and where they are not under guardianship their contracts, in the absence of fraud or undue advantage by those contracting with them, may not be repudiated, without restoring what was received on such contracts, if the persons with whom the agree-

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ments were made were at the time of making the same, ignorant of their mental incapacity."

In *Fulwider v. Ingels, Guar.*, 87 Ind. 414, the court approved the doctrine that when a person apparently of sound mind, and not known to be otherwise, fairly and *bona fide* purchases property, and the contract becomes so far executed that the parties can not be placed *in statu quo*, such contract can not afterwards be set aside, either by the alleged insane person or by his representative.

In the case last cited, the guardian of a person of unsound mind brought the suit to set aside an exchange of lands. The facts alleged in the answer were similar to the facts averred in the reply under consideration. The court held the answer insufficient.

In *North-Western Mutual Fire Insurance Co. v. Blankenship*, 94 Ind. 535, 546, the court held that where the lunatic has received and had the benefit, the contract being fair and made *bona fide* without knowledge of the lunacy by the other party, it would be unconscionable to refuse to enforce it.

It is not alleged in the reply what the consideration of the note was or what became of the consideration for which the note was executed. It is alleged in general terms that said Arnold "received full value for said note and understood at the time said note was made what it was given for and he received the full consideration of said note and used the same in his lifetime, well understanding the whole transaction and never attempted nor offered to rescind or disaffirm said contract."

There is no allegation that the note was executed for necessities. Neither is it averred that the contract was fair and that it was entered into in good faith by appellant in ignorance of the mental incapacity of Arnold or that the parties can not be placed *in statu quo*.

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Under the authorities cited, the reply, in our opinion, was not sufficient. On the facts, as disclosed by the pleadings, appellant was not entitled to recover on the note. Whether the facts and circumstances connected with the transaction were such as to authorize a recovery for the consideration that entered into the note is a question that is not before us.

Judgment affirmed.

Filed Jan. 16, 1895.

No. 1,448.

SPAULDING v. SONES.

MORTGAGE.—*Statutory Penalty for Failure to Satisfy Mortgage.*—*Complaint, Sufficiency of.*—*Presumption.*—In an action to recover the \$25 forfeiture for failure and refusal to satisfy a mortgage upon demand after the debt secured by the same has been paid, the complaint is sufficient which establishes the relation of mortgagor and mortgagee, for the relationship once being established, it will be presumed to continue until the contrary is made to appear.

From the Elkhart Circuit Court.

O. T. Chamberlain and *P. L. Turner*, for appellant.

H. D. Wilson and *W. J. Davis*, for appellee.

LOTZ, J.—The appellee was plaintiff and appellant defendant in the court below. In her complaint, the appellee alleged that on the 23d day of May, 1891, her husband joining with her, she executed a mortgage upon certain real estate owned by her in Elkhart county, to secure the payment of a note of the same date due in one year after date and payable to the defendant for the sum of \$50; that said mortgage was thereafter duly recorded in mortgage records of said county; that afterwards and

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before the maturity of said note she paid the defendant the full amount of principal and interest due thereon; that after the payment of said note and mortgage she requested the defendant to release said mortgage of record, but that defendant wholly failed and refused to release the same. She prayed judgment for \$25 penalty and \$25 attorney's fees, and for all other proper relief. The main purpose of the action seems to have been to recover the penalty provided for in section 1105, R. S. 1894. The appellant answered in denial and the cause was submitted to a jury, which assessed appellee's damages in the sum of \$25. The complaint was not challenged in the court below. The assignments of error are: First, that the complaint does not state facts sufficient to constitute a cause of action; and, second, the overruling of appellant's motion in arrest of judgment.

Section 1105, *supra*, provides that the owner or holder of any mortgage or other person whose duty it shall be to release any mortgage recorded in this State, who shall refuse, neglect, or fail to release such mortgage of record when the debt or obligation which such mortgage was made to secure, shall have been paid or discharged and he shall have been requested to release the same, shall forfeit and pay to the mortgagor or person having the right to demand the release of such mortgage, the sum of \$25, which sum may be recovered by suit in any court of competent jurisdiction, together with reasonable attorney's fees incurred in the collection of said penalty.

The appellant insists that the policy of the law is opposed to the enforcement of penalties and forfeitures, and that statutes which give them must be strictly construed, and that a complaint seeking to enforce them must make a clear and unequivocal case. This much may be conceded.

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The only objection urged against the complaint is that it does not affirmatively appear that the appellant was the owner or holder of the mortgage at the time of payment, or that any duty rested upon him to make the release when requested to do so. It is true there are no direct averments to this effect; but it is averred that the appellee executed the mortgage to secure the payment of a note payable to the appellant, and that she afterwards fully paid the same to him and requested him to release the mortgage. It sufficiently appears from these averments that at one time he was the owner and holder of the note and mortgage, to wit, at the time of the execution. The relation of mortgagor and mortgagee is fully established and shown by these averments. A *status* once established, or a relationship once shown to exist, is presumed to continue until the contrary appears. *Eames v. Eames*, 41 N. H. 177; *Kidder v. Stevens*, 60 Cal. 414.

Especially should this presumption be indulged when it further appears that the person named as the payee and mortgagee accepted payment.

We think the complaint good after verdict.

Judgment affirmed.

Filed Jan. 16, 1895.

No. 981.

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VERDICT.—*Negligence, Presumption on General Verdict.*—*Interrogatories.*

—In an action for negligence, the presumption is that the jury, by their general verdict, have found every material allegation of the complaint to have been proven; and that presumption conclusively prevails on appeal unless the contrary is clearly shown by the answers to the interrogatories.

SAME.—*Interrogatories Overriding General Verdict.*—The special find-

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ings override the general verdict only when both can not stand; and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before judgment can be given against the party for whom the general verdict was returned.

NEGLIGENCE.—Master and Servant, Promise to Repair.—Continuing in Service.—Danger Imminent.—Where the master, on being notified by the servant of the defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence; and, if an injury results therefrom, he may recover, except when the danger is so imminent that no prudent man would undertake to perform the service.

SAME.—Continuing in Service of Master.—Danger Imminent.—If the danger from continuing in the master's service is so imminent that no one but a person utterly reckless of his personal safety would continue in the service under the circumstances, it would be negligence to continue such service as will bar a recovery.

SAME.—Continuing in Master's Service.—Presumption.—The continuance of an employe in the dangerous service of his master, after a promise by the master to repair, during the time reasonably necessary for the employer to repair the defect, does not raise a conclusive presumption of negligence on the part of the employe. Where the danger is equally known to both, the presumption ordinarily is that the employer would not request or direct the employe to do what no one except a person utterly reckless of his own personal safety would do.

SAME.—Court Determining Question of Negligence.—If all the facts and circumstances are before the court, and they are such that only one conclusion can be drawn from them, the question of contributory negligence may be determined as a matter of law.

SAME.—Use of Defective Lantern by Brakeman, Promise to Furnish a New One.—For facts not showing contributory negligence in a brakeman using a defective lantern, and continuing in the service by reason of a promise to furnish a new lantern, see opinion.

APPEALS.—Superior Court of Marion County.—No Appeal.—A failure to pray for an appeal is waived by the appellee appearing at general term and not objecting to the appeal on that ground.

From the Marion Superior Court.

A. Baker and E. Daniels, for appellant.

R. N. Lamb and R. Hill, for appellee.

DAVIS, J.—This action was instituted by appellee to

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recover damages for personal injuries alleged to have been sustained by him, without fault on his part, through the negligence of appellant. On trial by jury a general verdict was returned in favor of appellee for two thousand dollars, and also answers to twenty-five interrogatories.

The court, at special term, sustained appellant's motion for judgment in its favor on the answers to the interrogatories, notwithstanding the general verdict. On appeal to general term, this judgment was reversed. The facts in brief, as shown by the complaint, the general verdict, and the answers to the interrogatories, are as follows: On the fourth day of December, 1888, appellee was employed by appellant as a brakeman in handling freight cars, on appellant's tracks, in and about Indianapolis. Appellant furnished appellee with a lantern, which was necessary to his work, during night hours, in making couplings of freight cars, giving signals and the performance of other duties. This lantern appellee found was defective and liable to go out, and reported this fact to appellant's superintendent, and asked for a good and safe lantern. The superintendent informed appellee that the company had ordered a new supply of lanterns, and directed appellee to continue at his work, and promised that he should have a new and safe lantern just as soon as they arrived, and said he was expecting them every day. Appellee continued to report to appellant's superintendent each day the fact that the lantern with which he was working was defective and dangerous, and at each report was promised a new and safe lantern and requested to continue at his work and do the best he could until the new lanterns arrived. Appellee, relying upon the promise of appellant to furnish him a new, suitable and safe lantern, and believing that there was no great, immediate, or imminent danger in using said

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old and defective lantern, complied with the direction, of appellant.

On the night of the fifth day of appellee's employment the light of the lantern went out while appellee was engaged in coupling cars, and the injury occurred which resulted in the loss of his arm; that on each preceding night while using it in the ordinary and customary way the light in said lantern had gone out, but whether it was then being used in giving signals or the performance of other duties, how long the lantern was so used, or how often it went out on each night does not appear. There is no express finding that the lantern had ever been, before the injury, used in coupling cars after night, but there is a finding that there was no evidence that the light in the lantern had ever gone out before this occasion while appellee was using the same between the cars for the purpose of coupling them, and there is a finding that it was dangerous for a person to attempt to couple cars with a lantern, the light of which was accustomed to go out in the ordinary use of the lantern, and that the danger was great, apparent and continuous, while the lantern was being so used, and there is another finding that an ordinarily cautious and prudent man would not knowingly continue to use for coupling cars by night a lantern, the light of which in the ordinary use of the lantern, *for such purpose*, had *continuously* theretofore been accustomed to go out.

The only question presented for our consideration is whether appellant was entitled to judgment upon the answer of the jury to the interrogatories, notwithstanding the general verdict.

The jury by their general verdict have presumably found every material allegation of the complaint to have been proven, and that presumption conclusively prevails in this court unless the contrary is clearly shown

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by the answer to the interrogatories. *Cleveland, etc., R. W. Co. v. Johnson*, 7 Ind. App. 441.

The special findings override the general verdict only when both can not stand, and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered. *Amidon v. Gaff*, 24 Ind. 128.

The rule is well settled that an employer is bound to use ordinary care to provide safe appliances for his employes; that the employe has the right to act upon the assumption that his employer has used, and will use such care, until he acquires knowledge of the defect, or by the exercise of reasonable care might acquire such knowledge; that the employe who continues in the service after notice of the defective appliance assumes the risk attending the use of such defective appliances, unless the master promises to remedy the defect. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20.

The promise of the master is the basis of the exception. The promise of appellant to provide appellee with a new lantern within the reasonable time necessary for its performance removed all ground for the argument that he, by continuing in the employment, under the circumstances disclosed, assumed the risk of the dangers incurred by the use of the defective lantern. *Indianapolis, etc., R. W. Co. v. Watson, supra*; *Hough v. Railway Co.*, 100 U. S. 213; *Goldberg v. Schrayner*, 37 Ill. App. 316.

The remaining question for our consideration is whether the answers to the interrogatories disclose such a state of facts as will excuse appellant upon the ground of contributory negligence on the part of appellee.

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In *Hough v. Railway Co.*, *supra*, the court says: "We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as a matter of law, absolutely conclusive of the want of due care on his part."

In this connection we quote the following from the opinion in the case of *Indianapolis, etc., R. W. Co. v. Watson*, *supra*: "It is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employe must not subject himself to great and evident danger, since this he can not do without participating in the employer's fault. * * When the line of danger, direct and certain, is reached, there the citizen must stop, and he can not pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur."

It is alleged in the complaint that the lantern was de-

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fective, and that in the ordinary mode of using it in making couplings of freight cars, giving signals and the performance of other duties, the light was liable to be suddenly extinguished, of which facts appellee informed appellant; and, also, "that there might be danger to plaintiff in performing the duties required of him."

It is further alleged that appellee believed "there was no great or immediate danger in using said old lantern."

It appears, from the answers to the interrogatories, that appellee knew the lantern was defective and dangerous; that the light was accustomed to go out in the ordinary use of the lantern, and that in fact it had gone out on each day appellee had used it, and that the danger was great, apparent and continuous while the lantern was being used in the attempt to couple cars by night. It is specifically alleged, as we have seen, that appellee, while using the lantern in reliance on the promise of appellant to supply a new one within a short time, believed there was no great or immediate danger in so using said old lantern, and while there is no express finding that in fact he did know that the danger in continuing to use the lantern was great and imminent, there is the finding that he knew the lantern was defective and that the light was accustomed to go out in the ordinary use of the lantern—in giving signals and in the performance of other duties—and that the danger in using the lantern in coupling cars was great, apparent, and continuous. If the danger in using the defective lantern in coupling cars was apparent to appellee, it was known to him. If such danger was continuous, it was constant. If the danger continued without break or cessation, it was immediate and imminent.

It is further found by the jury that an ordinarily prudent and cautious man would not knowingly continue to use for coupling cars by night a lantern the light of

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which, in the ordinary use of the lantern for such purpose, had continuously theretofore been accustomed to go out.

Counsel for appellee insist that it does not appear that the light was accustomed to go out continuously, or that it had ever previously gone out while appellee was using it in coupling cars. It may be conceded that under the issues the fact may have been proven that appellee had, prior to the injury, used the lantern a number of times on each night in coupling cars, and it is true there is an express finding that there was no evidence on the trial in support of the proposition that the light of the lantern had at any time prior thereto gone out while the lantern was being so used. It is also true there is no finding that the light was accustomed to go out continuously when the lantern was in use in giving signals or in the performance of any other duties by appellee. The answer to this interrogatory, for the reason stated, is not in irreconcilable conflict with the general verdict.

The jury, however, did find the facts, as we have before observed, that the light was accustomed to go out each night in the ordinary use of the lantern by appellee in giving signals and the performance of other duties, except coupling cars.

Now, under the rule enunciated in *Indianapolis, etc., R. W. Co. v. Watson, supra*, what is the correct solution of the question under consideration?

Counsel for appellee contend that the Watson case was reversed solely on the ground that there was no promise made to furnish him a safe lantern. We do not so understand the decision in that case. One of the questions decided in that case was that there was no evidence tending to prove that Watson was induced to remain in the service of the company by any promise, express or implied, that a safe lantern would be provided.

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Judge ELLIOTT, speaking for the court in that case, says:

"It is probably true that the promise of the employer, when relied on by the employe, will rebut a presumption of contributory negligence in cases where the danger is not great and immediate, but this presumption yields whenever it appears that the employe voluntarily incurs a known and immediate danger of so grave a character that it would deter a reasonably prudent man from incurring it.

"In the case before us, the testimony convincingly shows that the appellee knew the danger he encountered, and it shows, also, that it was so great and immediate that a prudent man would not have assumed the risk it created. It results that even if it were conceded that there was a promise, and a reliance on it, there could be no recovery."

The judgment of the court below was therefore reversed on two grounds:

1. Because there was no promise shown.
2. If the promise had been established, that Watson was shown to have been guilty of contributory negligence.

In this case the answer to the interrogatories disclosed that appellee knew the danger he encountered when he was injured was great and continuous, but there is no express finding as a fact by the jury that a prudent man would not have encountered the risk under the circumstances.

The only question, therefore, that we are required to determine is, does it necessarily and inevitably follow, as a matter of law, that an employe who encounters a great, apparent, and continuous danger under such circumstances is guilty of contributory negligence?

The general verdict for the appellee includes a finding

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that he used ordinary care. In other words, that a prudent man would have encountered the risk under the circumstances. *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39.

Are the special findings so in conflict with the general verdict on the question that there is no possibility of the antagonism being removed by any evidence legitimately admissible under the issues?

Is the fact that appellee knew that the danger in the use of the lantern in coupling cars was great and continuous, under the circumstances, as a matter of law, absolutely conclusive of the want of due care on his part?

In this connection we quote from and refer to the following authorities:

"The question of contributory negligence is ordinarily a question of fact for the jury to determine.

"It is only when the fact or facts recited lead inevitably to but one conclusion (and that the conclusion of negligence), that the court can be called upon to say, in an instruction, that certain facts constituted negligence."

Board, etc., v. Sappenfield, 6 Ind. App. 577.

"Where a master, on being notified by the servant of defects that render the service dangerous, expressly promises to repair the defect, or to do what is equivalent thereto, the servant may continue in the employment for such a period of time as it would be reasonable to allow for the performance of the promise. In such case, if injury results, the servant may recover, unless the danger is such that no prudent person would continue to perform the service. The servant's knowledge of the defect is not, under such circumstances, conclusive of the want of due care on his part, because the promise of the master to remove the danger justifies him in continuing in the service, and relieves him of the charge of negligence. If the master fails to make his

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assurance good, he is chargeable with a failure to exercise ordinary care. It is, however, a question of fact for the jury to determine whether the defect is so serious that a prudent person would not continue in the performance of the required work." *Chicago Drop Forge and Foundry Co. v. Van Dam*, 36 N. E. Rep. 1024. See, also, *Matchett v. Cincinnati, etc., R. W. Co.*, 132 Ind. 334; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327.

"It has been held that knowledge of danger is not always conclusive evidence of contributory negligence, although the fact of such knowledge may have an important bearing upon that question." *Evansville, etc., R. R. Co. v. Athon*, 6 Ind. App. 295; *Haynes, Spencer & Co. v. Erk*, 6 Ind. App. 332; *Citizens' Street, etc., R. W. Co. v. Spahr*, 7 Ind. App. 23.

"The right of appellee to recover could not be affected by his having contributed to the injury by his act, unless he was in fault in so doing." *Noblesville Gas and Improvement Co. v. Teter*, 1 Ind. App. 322; *Louisville, etc., R. W. Co. v. Davis*, 7 Ind. App. 222.

"It is now uniformly stated by the text writers that where the master, on being notified by the servant of the defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and, if an injury results therefrom, he may recover unless when the danger is so imminent that no prudent man would undertake to perform the service. The doctrine on this subject rests on sound principle, and it will be found to be supported by English and American decisions. The reason upon which the rule is said to rest is that the promise of the master to repair defects relieves the servant of the charge of negligence by continuing

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in the service after the discovery of the extra perils to which he would be exposed. This exception to the rule has frequently come before the court, and has often been held sufficient to sustain a recovery by the servant against the master for injury received under such circumstances. The reason for the exception may be stated to be that when the master has knowledge of the defects and promises to repair the same, he impliedly requests the servant to continue work, and that he (the master) will take upon himself the responsibility of any accident that may occur during that period." *Clarke v. Holmes*, 7 Hurl. & Nor. 938, cited approvely in *Furnace Co. v. Abend*, 107 Ill. 44.

Another well recognized principle exists, that may be considered as ingrafted on, and a modification of, the exception to the rule, and that is: If the danger from continuing in the master's service is so imminent that no one but one utterly reckless of his personal safety would continue in the service under the circumstances, it would be negligence to continue such service, that would bar a recovery. The question as to the knowledge of the defect by the master, whether he promised to repair, and whether the servant continuing in the service did so when the danger was so imminent that none but a person utterly reckless of his personal safety would continue in the service, are all questions of fact, to be determined by the jury. *Chicago and Anderson Pressed Brick Co. v. Sobkowiak*, (Ill.) 36 N. E. Rep. 572.

In such cases unless the danger is so imminent that no one but one utterly reckless of his own personal safety would continue in the service under the circumstances, the employe is not in fault in complying with the request of the employer, and the employer is held by his promise to have taken upon himself the responsibility of any accident that may occur to the employe by the use

of the defective appliances during such period as may be reasonably necessary to remedy the defect. In determining the question whether a reasonably careful and prudent man would, in reliance on the promise of the employer to remove the danger, continue temporarily in the performance of his duties in the face of the known, apparent and continuous danger, all the circumstances connected with the nature of the service, the defect, the danger, and the promise should be considered. The continuance of the employe in the dangerous service during the time reasonably necessary for the employer to repair the defect does not in such case raise a conclusive presumption of negligence on the part of the employe. In such cases when the danger is equally known to the employer and employe, the presumption ordinarily is that the employer would not request or direct the employe to do what no one but one utterly reckless of his own personal safety would do. If, however, it does appear in any such case, from all the facts and circumstances, that the danger is so imminent that no one but one utterly reckless of his own personal safety would continue in the service during the time necessary to perform the service, and the employe is injured while so engaged, he is held to be guilty of contributory negligence. If all the facts and circumstances are before the court, and they are such that only one conclusion can be drawn therefrom, this question may be determined as a matter of law by the court. *Cincinnati, etc., R. W. Co. v. Grames, supra.*

In view of the authorities cited, it appears to us that it was for the jury to say whether the danger was so great, apparent, and continuous that none but a reckless brakeman, utterly careless of his own safety, would have continued in the service in which appellee was injured. If, under all the circumstances, and under the promise

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to supply him with a new lantern, appellee was not wanting in due care in using the lantern to couple the cars, then the company will not be excused for its negligence upon the ground of contributory negligence. If there was a finding that an ordinarily cautious and prudent man would not knowingly continue to use such a lantern in coupling cars, under the circumstances disclosed by the evidence in this case, a different question would be presented. In this case there is no finding that this lantern had been previously used "*for such purpose*," or that it had *continuously* theretofore been accustomed to go out, or that an ordinarily cautious and prudent man would not, under the circumstances, continue to use in making couplings of freight cars, a lantern, the light of which was accustomed to go out in giving signals and the performance of other duties, except coupling cars.

It may be that it is probable that the light in the lantern was as likely to go out while it was being used by appellee in coupling cars as it was accustomed to do in giving signals and in the performance of other duties. It is not our province, however, to indulge in inferences or probabilities. In this connection it should be borne in mind that the jury found on the question of due care, in answer to interrogatories, only, as we have before observed, that if the light in a lantern used in coupling cars by night was, while used for such purpose, accustomed to go out continuously, an ordinarily cautious and prudent man would not knowingly continue to use such lantern for coupling cars by night, but they did not find the lantern in question was such a lantern.

Neither did the jury find that an ordinarily cautious and prudent man would not, under the circumstances, have used the lantern in coupling cars on this occasion.

What the peculiar circumstances, if any, were in connection with the use of the lantern by appellee when he was injured, we do not know. We are to presume, however, that any and all evidence legitimately admissible under the issues in favor of appellee was introduced. It was possible, under the issues, for such circumstances to have been shown as would have created an imperative duty on his part to act then and there in an attempt to couple the cars in order to enable the company to move its freight and passenger trains during that night. The evidence may have disclosed some emergency which required the coupling of the cars at that time, and if, in such emergency, in the line of his duty, he proceeded with the defective lantern, using care commensurate with the danger, to do what was required to be done for his master, he was not necessarily guilty of contributory negligence *per se* under the facts and circumstances shown in the interrogatories and answers thereto.

It is true the nature of the cause of action and the answers to the interrogatories are such as would lead, in the absence of the general verdict, to the inference that an ordinarily prudent man would not have continued to use the lantern in question, but this inference the court can not make against the general verdict, since we can make no intendments in support of the answers to the interrogatories.

Before contributory negligence can be adjudged against appellee in this case, by the court, it must appear:

1. That the danger incurred by him was known and immediate.

2. That a prudent man would not, under the circumstances, have assumed the risk incident to the use of the defective lantern on this occasion.

The answers to the interrogatories do not, in our opin-

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ion, sustain the second proposition against the general verdict.

Judgment affirmed.

Filed Nov. 15, 1894; petition for rehearing overruled Feb. 6, 1895.

ON PETITION FOR A REHEARING.

DAVIS, J.—The learned counsel for appellant have filed an earnest petition for a rehearing. The questions so ably presented for our consideration have been fully discussed by the court in consultation, and our decision thereon has been and is adverse to appellant.

Section 1414, R. S. 1894, the same being section 1361, R. S. 1881, in relation to appeals from the special term to the general term, in part, reads as follows: "It shall only be necessary for a party appealing from a special to the general term to pray an appeal to the general term, and it shall be granted as a matter of right," etc.

The record in this case does not disclose that an appeal was prayed for and granted in special term, but in all other respects it appears that the statute in relation to appeals has been complied with, and that without objection appellant appeared in general term, and by agreement submitted the cause on appeal to the court.

The appellant having appeared in the general term, and by agreement submitted the cause on appeal to the decision of that court, it is too late, after the rendition of the final judgment by the general term against appellant, for appellant to say that the general term did not have jurisdiction of the action for the reason that no appeal was prayed for and granted in special term. *Critchell v. Brown, Exr.*, 72 Ind. 539; *TenBrook v. Maxwell, Admr.*, 5 Ind. App. 353.

Petition for rehearing overruled.

Filed Feb. 6, 1895.

Ross, C. J.—For the reasons stated in the dissenting opinion heretofore filed by me, I think a rehearing should be granted.

Filed Feb. 6, 1895.

DISSENTING OPINION.

Ross, J.—The pivotal question in this case is whether or not the appellee, knowing the defective condition of the lantern, had a right to continue to use it, although appellant had promised to furnish him a new one when the new supply, which had been ordered, arrived; and, continuing to use it, and having been injured by reason thereof, can make the appellant answer in damages therefor.

It is a well settled rule that when a servant continues in the service of the master, knowing of the defective condition of the machinery with which he is to work, he thereby assumes the risk as increased by the defect. *Parke County Coal Co. v. Barth*, 5 Ind. App. 159; *Becker v. Baumgartner*, 5 Ind. App. 576; *Kentucky and Indiana Bridge Co. v. Eastman*, 7 Ind. App. 514; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Pennsylvania Co. v. O'Shaughnessy, Admr.*, 122 Ind. 588; *Louisville, etc. R. W. Co. v. Corps*, 124 Ind. 427; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156; *Buzzell v. Laconia Mfg. Co.*, 48 Maine, 113; *Hatt v. Nay*, 144 Mass. 186, and cases cited; *Beach Cont. Neg.* (2d ed.), section 371, and cases cited.

To this general rule there is an exception which arises when the master induces the servant to remain in his service upon a promise to remedy the defect.

“The only ground upon which the exception before

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us can be justified is, that in the ordinary course of events the employe, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employe sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it." Wharton Neg. (2d ed.), 221. The servant has a right to assume that the master will keep his promise and make the repairs, but when he learns that the promise has not been observed and the repairs not made, he can no longer act upon the assumption. Knowledge on his part that the defect has not been remedied puts an end to the right to assume that the master has done his duty. *Webber v. Piper*, 38 Hun (N. Y.) 353; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20.

The exception to the general rule, therefore, can only be upheld on the theory that the servant has reason to expect that in consequence of his notification and the master's promise to repair the defect, the repairs will be made before he will be subjected to danger from it; and this upon the hypothesis that, as it is the duty of the master to furnish reasonably safe machinery and keep it in reasonably good condition and repair, he will do so when notified that it has become defective and unsafe for use.

I am free to admit that some of the cases apparently hold that a promise to repair on the part of the master is in effect a guaranty to indemnify the servant against injury while he remains exposed to the known peril. The great weight of authority, however, and all that can reasonably be deduced from the cases where the question has been fully considered is that if the danger from the use of the defective machinery is not great or imminent the servant may continue in the service a reasonable

length of time after the promise to repair, and that if he is injured during that time he may maintain an action therefor. But even those cases hold that if the defect is such that obviously with the use of the utmost skill and care danger is imminent, the servant assumes the risk if he encounters it, notwithstanding the promise of the master to repair. *Indianapolis, etc., R. W. Co. v. Watson, supra*, and cases cited; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Woods Master and Servant* (2d ed.), section 379.

The reason for the exception is not because the naked promise of the master makes the danger any the less or relieves the servant in any degree from the exercise of all reasonable diligence and care to avoid being injured, but because he is induced by the master to believe that the defect will be removed, and he will not be longer exposed to it. He is thus lulled into a feeling of security. But if the promise is not kept, and he knows it, and still continues to use the machinery in its defective condition, the inducement is gone, and he can not close his eyes to the dangers which confront him. To hold otherwise would be to cast upon the master the obligation of exercising a greater degree of care for the safety of the servant, than the servant is bound to exercise for himself. The promise creates no greater obligation, but simply implies that the master will do the duty which the law imposes upon him to furnish his servants with machinery reasonably free from defects.

Among the interrogatories submitted to, and answered by, the jury in this case are the following:

"14th. Was the plaintiff injured on the 8th day of December, 1888, at between 6 and 7 o'clock in the evening, by having his left arm caught between the deadwood of a moving and a stationary car while he was making a coupling of the two cars, and while he was

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standing between the two cars for the purpose of making that coupling? Answer. Yes.

"15th. If you answer question thirteen in the affirmative, that plaintiff, at the time of his said injury, had in his hand a lantern, then state here whether or not the light in the lantern he then had in his hand, had ever before that time, in the customary and ordinary use of it, gone out while it was in the plaintiff's hands and to his knowledge? Answer. Yes.

"16th. If you answer the last question in the affirmative, state how many times the light in said lantern had so gone out while in the plaintiff's hands, and while he was using it in the ordinary and customary way, and if the same occurred on more than one day, state what the dates were? Answer, Yes, each day.

"20th. Was it dangerous for a person to attempt to couple cars by night with a lantern, the light in which was accustomed to go out in the ordinary use of the lantern? Answer. Yes.

"21st. If you answer question twenty in the affirmative, state whether or not the danger was great, apparent and continuous while the lantern was so being used. If you say it was not, state why the danger to the person so using a lantern of that kind was not great, apparent and continuous while he was so using it? Answer. Yes.

"22d. Would an ordinarily cautious and prudent man knowingly continue to use for coupling cars by night, a lantern the light in which, in the ordinary and customary use of the lantern for such purpose, had continuously theretofore been accustomed to go out? Answer. No, not if it continuously went out."

From these interrogatories and the answers thereto, the jury find that the appellee was knowingly using a lantern furnished him by appellant, which, in the customary and ordinary use for which it was furnished and

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used, was liable to, and did, go out so that it was dangerous to use it; that the danger of using it was great, apparent, and continuous, and that an ordinarily cautious and prudent man would not knowingly continue to use it.

These facts can lead to but one conclusion, namely, that it was appellee's own act that caused the injury.

As ELLIOTT, J., in the case of *Indianapolis, etc., R. W. Co. v. Watson, supra*, says: "It is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse contributory negligence. Even if there be a promise by the employer, the employe must not subject himself to a great and evident danger, since this he can not do without participating in the employer's fault. The community have an interest in such questions, and that interest requires that all persons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death or serious bodily injury sins against the public weal. All must use ordinary care to avoid known and immediate danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop, and he can not pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur."

The jury here find that the danger from using the lantern was *great, apparent, and continuous*, and that no

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ordinarily cautious and prudent man would use it. To risk danger which is great, apparent, and continuous is equivalent to courting injury, and one who does so must alone suffer.

The lantern furnished appellee by appellant can not well be called machinery in the sense in which that word is usually used. It is rather an implement, not necessarily used to work with, but to furnish light by which to work.

Hence, as is said by a recent writer, Bailey's Masters' Liability to Servants, 209: "In cases where persons are employed in the performance of ordinary labor, in which no machinery is used and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employe has full knowledge and comprehension, can be regarded as making out a case of liability. A common laborer who uses agricultural implements while at work upon a farm or in a garden or one who is employed in any service not requiring great skill or judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence if, in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has therefore imposed upon him. He fully comprehends that the instrument which he employs is not perfect, and, if he is injured, it is by reason of his own fault and negligence. The fact that he notifies the master of the defect, and asks for another implement, and the master promises to furnish the same, does not render the master responsible, if an accident occurs. A rule imposing such a li-

ability in such a case would be far reaching, and would extend the principle 'that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish proper, perfect, and adequate machinery or other materials and appliances necessary for the proposed work,' to many of the vocations of life for which it was never intended."

The same language may be found in the case of *Meador v. Lake Shore, etc., R. W. Co.*, 138 Ind. 290. In that case the railway company furnished its servant a ladder to be used by him in the performance of his duty of lighting and extinguishing lamps at places where streets in the town of Elkhart crossed the railroad. The ladder got out of repair and the servant complaining of its condition, the company promised to furnish a new one soon. He continued to use the defective one and was injured, and the court held that he could not recover for the reason that he assumed the risk, notwithstanding the promise of the master to furnish a new one.

In the case of *Crichton v. Keir*, 1 Macph. (1 Scotch. Court of Sessions) 407, it was held that "In an action of damages at the instance of a railway laborer against his masters (the contractors) for bodily injury alleged to have been sustained through their furnishing him with a horse unfit, from age and otherwise, for the work which it had to do, the pursuer (plaintiff) alleged, *inter alia*, that his masters were aware of the unfitness of the horse, had promised to furnish another, and had induced the pursuer to go on with the old horse in the meantime by promises of assistance, which they had failed to fulfill—held that the pursuer's averments showed that he knew the unfitness of the horse and the danger of continuing to work with it; and, therefore, that he had no claim against his masters on account of the injury alleged."

See, also, *Marsh v. Chickering*, 101 N. Y. 396; *Cor-*

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coran v. *Milwaukee Gaslight Co.*, 81 Wis. 191; *Jenney Electric Light and Power Co. v. Murphy*, 115 Ind. 566; *Gowen v. Harley*, 56 Fed. Rep. 973, and cases cited.

In the case under consideration, the promise which the appellee alleges in his complaint he relied upon was not to repair the lantern then being used by him, but a promise to furnish him a new one when a new supply arrived. He was not induced to continue the use of the old lantern under a promise that it would be repaired, relying upon which he continued its use upon the assumption that the appellant had kept the promise, and made the repairs; but, on the contrary, he knew that it was not to be repaired, and that if he continued in the appellant's employ he must use it in its defective condition until the arrival of the new lanterns.

In the case of *Marquette, etc., R. R. Co. v. Spear*, 44 Mich. 169, Cooley, J., speaking for the court, says:

"But it is argued that the company promised to repair the engine, and plaintiffs had a right to rely upon this being done. The promise was to repair it sometime; and meantime the instrument was being employed by plaintiffs from day to day with knowledge that the repairs were not made. When there is a promise to repair immediately, or within a fixed time, and a party relies upon its having been done, and is injured because of such reliance, he has a right to complain; but this is no such case. The promise was wholly indefinite, and plaintiffs never relied upon it except as a probable future event. They knew the repairs had not been made when they employed the engine on the day of the fire, and they deliberately and most carelessly took the risks of what actually happened."

In the case of *Webber v. Piper, supra*, the court says: "There was no defect in the saw beyond the fact that it was out of set. This is of constant occurrence when the

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saws are being used. The plaintiff asked that the saw be set and he was told, in substance, that it would be done at noon or be seen to at noon. The plaintiff, with full knowledge that the saw was out of set, used it, and he testified that by reason of the saw being out of set he was injured. The risk was one incident to the business."

In view of the fact that the jury find that the appellee knew of the defective condition of the lantern; that the danger from using it in that condition was great, apparent, and continuous, and that an ordinarily cautious and prudent man would not have used it.

I think the court below, in general term, erred in reversing the judgment in favor of appellant on the answers to the interrogatories, notwithstanding the general verdict.

Filed Nov. 15, 1894.

No. 1,085.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS CONSOLIDATED RAILWAY COMPANY v. HICKS.

NEGLIGENCE.—Pleading in General Terms.—Vagueness.—Negligence may be pleaded in general terms under our code, but the allegations must not be so general as to culminate in vagueness or be so uncertain as to admit of almost any kind of proof. If enough be averred to show the existence of a legal duty and its breach, a very slight designation that the act done or omitted was committed or omitted in the absence of due care, is sufficient to support a charge of negligence.

SAME.—Complaint, Averment of Negligence.—In a complaint founded upon a failure to perform a legal duty the act done or omitted to be done should be characterized as having been negligently done or negligently omitted.

SAME.—Dependent or Independent Causes, Joinder.—If there be several causes dependent or independent of each other, all of which con-

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tribute to the injury, an action may, in a proper case, be founded upon all or any one of the causes.

SAME.—*Negating Assumption of Risk.—Averment of Notice.—Specific Control General Allegations.*—The pleader may negative the assumption of the risk on the part of the plaintiff and aver knowledge of the defects on the part of the defendant in general terms, but if he, after making the general allegation, also attempt to state the facts specifically, the specific will control the general allegations.

NOTICE.—*Master Must Take Notice that Machinery and Tools Wear Out.*—A master is chargeable with notice of the tendency of machinery and tools to wear out.

SAME.—*When Master Not Entitled to Notice.*—If the negligent act is an affirmative one and is done by the master personally, notice to him is involved in doing the act, and the same is true if the negligent act be done by another under his order or direction.

SAME.—*Averment of Notice to Master, When Necessary.*—If the negligent act is one of omission on the part of the master, notice is not necessarily involved in the act itself, and should be directly alleged, or such facts should be averred from which notice follows as a necessary inference.

SAME.—*Notice to Master, General Allegation of Negligence Not Sufficient.*—A complaint must contain a direct averment that the master had notice of the defect causing the injury, or such facts must be averred from which notice arises as a necessary inference, and in such cases a general allegation of negligence is not sufficient.

From the Floyd Circuit Court.

A. Dowling, for appellant.

C. L. Jewett, H. E. Jewett, J. V. Kelso and C. D. Kelso,
for appellee.

Lorz, J.—The only error assigned in this case is the overruling of the demurrer to the complaint.

The complaint is as follows:

“Said plaintiff complains of said defendant and says, that on, before and ever since the 8th day of July, 1891, said defendant was, and now is, a railroad corporation, operating a railroad from the city of New Albany, Floyd county, State of Indiana, through said county and State to St. Louis, in the State of Missouri; that on said day this plaintiff was in the service of said defendant as

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brakeman, on one of its freight trains, which was being pulled from Huntingburg, in Dubois' county, in said State of Indiana, over defendant's said railroad to said city of New Albany; that said train consisted of a locomotive and sixteen cars and one caboose; that two box cars were next to said locomotive, nine coal cars next to said box cars, and four box cars between said caboose and said coal cars, the said caboose being in the rear of said train; that all of said cars were loaded, the said coal cars being loaded with coal; that said train was manned with an engineer and fireman, who were on said locomotive, a conductor, who was on said caboose, and two brakemen, one of whom was the plaintiff; that five miles west of said city of New Albany said defendant's said railroad commences to descend a heavy grade down the knobs toward said city for the distance of at least three miles; that at the beginning of said grade, near the top of said knob, said railroad passes through a tunnel nearly one mile long; that when said train reached said down grade on said knob, and just before it entered said tunnel, it became and was necessary and the duty of said plaintiff and his fellow-brakeman to set the brakes of said train of cars, and to remain on the top of said cars during the passage of said tunnel and the descent of said grade; that plaintiff and his fellow-brakeman set all the brakes on said cars that could be set, but that by reason of several of said cars being equipped with brakes which were defective and out of repair, some of them not having a lever and some of them not having chains, the brakes thereon could not be set, and by reason thereof the said train attained a rapid and dangerous speed, and ran down said knob or hill at the rate of fifty miles per hour or more; that when said train reached a point on said down grade at or near Hoffman's switch it became and was plaintiff's duty to

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pass towards the front end of said train, and to do so he had to pass over said coal cars; that said coal cars were loaded with coal piled up from twelve to eighteen inches above the end and sides of said cars, the said coal having no support to keep it in its place on said cars; that in the performance of his duty as such brakeman plaintiff was compelled to climb or jump from one coal car to another and pass over the top of said coal with which they were loaded, as aforesaid, and that in attempting to get from one of said cars to another, using due care, the coal gave way under him and threw him off said car to the ground, thereby bruising and wounding his head, eyes and body, from the effects of which he became and has remained sick and has lost the use of one of his eyes, is subject to nervous prostration, and has been permanently disabled to his damage fifteen thousand dollars. Plaintiff says that his said injuries were not occasioned by any fault upon his part, but were directly caused by the fault and negligence of the defendant; that defendant's negligence consisted, as aforesaid, in not providing and equipping its said cars with efficient brakes and in improperly loading its said cars with said coal, none of which acts of negligence upon the part of the defendant did plaintiff know in time to avoid said accident and injuries."

The concluding part of the complaint in general terms characterizes two acts as being negligent—the failure to supply proper brake appliances, and the improper manner in which the coal was loaded. Negligence may be pleaded in general terms. This was the rule at common law, as well as under the code. The allegations must not be so general as to culminate in vagueness or be so uncertain as to admit of almost any kind of proof. If enough be averred to show the existence of a legal duty and its breach, a very slight designation that the act

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done, or omitted to be done, was committed or omitted in the absence of due care, is sufficient to support a charge of negligence. The general allegation of negligence has a technical significance. *Lake Shore, etc., R. W. Co. v. Kurtz*, 10 Ind. App. 60.

In *Brinkman v. Bender*, 92 Ind. 234, the concluding part of the complaint charged that a fire was caused wholly by the default and negligence of the defendant. Such averment was held to be broad enough to impute negligence to everything that the defendant did or suffered to be done. It is here averred that the plaintiff's "injuries were not occasioned by any fault upon his part but were directly caused by the fault and negligence of the defendant."

In a complaint founded upon the failure to perform a legal duty, the act done or omitted to be done should be characterized as having been negligently done, or negligently omitted to be done. Any other method of pleading negligence is extremely hazardous. Negligence or its equivalent must be directly averred, or such facts must be stated as that a presumption of negligence necessarily arises. *Pennsylvania Co. v. Marion*, 104 Ind. 239.

It is not directly charged that the defendant negligently failed to equip the cars with proper brake appliances, or that it negligently failed to load the coal properly and in a safe manner. The concluding averments are more in the nature of recitals than of direct averments. But as it was the defendant's duty to the plaintiff to furnish him with reasonably safe tools, machinery appliances, and place in which to work, and as this duty was a continuing one, and as it does appear that there was a breach of duty on the part of the defendant, we think when the averments are all taken to-

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gether that it appears that the acts were negligently done and omitted to be done.

Appellant's learned counsel insists that the averments do not show any connection between the defective brake appliances and the injury; that it does not appear that the train was proceeding at a dangerous rate of speed at the time the injury occurred; that for aught that appears, the plaintiff might have fallen from the car and sustained injury, even if the car had been moving at a moderate rate or was standing still; that there is nothing to show that the speed of the train had any effect upon the car, caused it to sway back and forth; or that it had any effect upon the plaintiff, causing him to lose his foothold.

The averments are somewhat indefinite, but this much is made to appear, that the plaintiff was employed as a brakeman on defendant's loaded freight train; that said train was not properly supplied with brake appliances; that such train was descending a heavy or rapidly declining grade; that plaintiff and his fellow-brakeman did their duty, and set all the brakes that could be set.

Appellant further insists that there is no legal connection between the injury and the defective brakes, and that as to the improper loading of the coal, it was a risk which was open and apparent, and was assumed by the plaintiff, and that it does not appear that the defendant had any notice that the coal was improperly loaded.

Upon the hypothesis that there is but a remote connection between the injury and the brake appliances, we will consider the sufficiency of the complaint.

Where there are several causes which are either dependent or independent of each other, all of which contribute to the injury, an action may, in a proper case, be based upon all or any one of the causes. In this view of the complaint, it only remotely appears that the speed

of the train had anything to do with the coal giving away, or with the fall of the plaintiff from the car. It is not directly averred that the speed of the train had any unusual effect either upon the car, the coal, or the plaintiff. In this view, the complaint can be sustained, if at all, only upon the allegation concerning the improper manner in which the coal was loaded.

It is averred that the defendant owned and operated the railroad, and that one of its freight trains on which the plaintiff was at work was being run from Huntingburg to the city of New Albany, and that one of the acts of negligence consisted "in improperly loading its said cars with said coal."

Taking all the averments together, the necessary inference is that the manner in which the cars were loaded was either the act of the defendant or was made its act by accepting it in the condition in which it was loaded. It does not appear that the plaintiff either loaded or assisted in loading the cars. The general allegation of negligence on the part of the defendant, and of freedom from fault on the part of the plaintiff, rebuts any inference that the plaintiff loaded or assisted in loading.

The coal itself is not described, but the manner in which it was loaded is set out. It is averred that "said coal cars were loaded with coal piled up from twelve to eighteen inches above the end and sides of said cars, the said coal having no support to keep it in its place on said cars." This loading is alleged to have been improper and negligent. It is not directly averred that the cars were loaded in an unusual or unsafe manner, nor that it was not customary to load cars with coal extending from twelve to eighteen inches above the ends and sides of the car, nor whether this manner of loading was exceptional. Nor does it appear at what distance from the ends and sides the coal reached a height of from

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twelve to eighteen inches, nor whether it was either necessary or customary to furnish any kind of support to keep coal in its place above the sides and ends of coal cars.

Appellant insists that it can not be ruled as a matter of law that a car upon which the coal is thrown up in the middle to the height of twelve or eighteen inches above the sides and ends is improperly loaded.

If there were no other averments in the complaint, this contention would prevail; but it is further alleged that the loading was negligent as well as improper. That which is negligently done is improperly done. The pleader may negative the assumption of the risk on the part of the plaintiff, and aver knowledge of the defects on the part of the defendant in general terms. But should the pleader, after making the general allegation, also attempt to state the facts specifically, the specific allegations will control the general. In the complaint before us it is alleged that the plaintiff did not know of the defect in time to avoid the injury. If he had no knowledge, he could not assume the risk. Assumption implies knowledge. But many of the particular circumstances attending the injury are specifically stated. If, from the specific allegations, it appear that the plaintiff assumed the risk, then the general allegation is overthrown. Whilst the manner in which the coal was loaded was open and visible, the court can not say, as a matter of law, that danger was apparent. It may have been block coal, and from appearances may have been reasonably safe. The general allegation, we think, is not overthrown. There is no direct averment that the defendant had notice that the coal was improperly loaded. If it appear from the averments, when taken as a whole, that defendant did have notice or could have had notice by exercising reasonable diligence, this will be sufficient.

The master's duty to provide his servant with reasonably safe appliances, machinery, and places in which to work is a continuing one, and he is bound to take notice of the fact that tools, machinery, and appliances are liable to wear out and become defective with age and use.

Where the negligent act is an affirmative one and done by the master with his own hand, notice to the master is involved in the doing of the act. And this rule holds good where the negligent act is done by another under the order or direction of the master. But where the negligent act is one of omission (mere passive negligence) notice is not necessarily involved in the act itself. Under such circumstances, notice should be directly alleged, or such facts should be averred, from which notice follows as a necessary inference. Negligence arising from tortious conduct implies the violation of a duty knowingly done. When such an act is characterized as being negligent, knowledge or notice is involved, else the act would not be a negligent act. It is for this reason that a general allegation of negligence is usually sufficient, for it includes knowledge on the part of the defendant.

It was decided by the Supreme Court in *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151 (155), as we understand that case, that a general allegation of negligence was sufficient to charge the defendant with notice of defective appliances. See also *Louisville, etc., R. R. Co. v. Utz, Admr.*, 133 Ind. 265. But in a more recent case in that court, *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156, being an action by the servant against the master for an injury resulting from a failure to furnish reasonably safe machinery and appliances, it was held that a complaint which charged that the injury was caused "wholly through the fault and negligence of the defendant in carelessly and negligently using said unsafe and

Louisville, Evansville and St. Louis Consolidated Ry. Co. v. Hicks.

defective engine" was insufficient to charge the master with notice of the defect. The rule as announced in the latter case, as we understand it, is that the complaint must aver directly that the master had notice of the defect, or such facts must be averred from which notice arises as a necessary inference, and that a general allegation of negligence is not sufficient in such cases. Conceding, as we must, that the general allegation of negligence does not cover notice of the defect on the part of the defendant, still it appears that the cars in question were either loaded by the defendant or accepted in the condition in which they were loaded.

The master was bound to see that the cars were in a reasonably safe condition when supplied to the plaintiff.

The complaint states a good cause of action based upon the improper manner in which the coal was loaded.

Judgment affirmed at the cost of appellant.

GAVIN, J., and DAVIS, J., concur in the result.

ROSS, J., absent.

Filed April 5, 1894.

ON PETITION FOR A REHEARING.

PER CURIAM.—When this cause was originally presented no point was made concerning the relation of fellow-servants. By failing to make that point it must be deemed waived. A rehearing will not be granted for a cause not presented in the first instance.

The petition is therefore overruled.

Filed Feb. 8, 1895.

Adams, Sheriff of Monroe County, *et al.* v. Hessian.

No. 1,447.

ADAMS, SHERIFF OF MONROE COUNTY, ET AL. v. HESSIAN.

REPLEVIN.—*Property Claimed as Exempt from Execution.—Refusal to Set Same Off to Defendant.—Mortgaged Property.*—Where the judgment defendant, after levy and before sale, presented to the sheriff a schedule of all his property of every description whatever, and demanded that the property described in the complaint be set off to him as exempt from execution, and the property was appraised according to law, but the sheriff refused to set the same off to such defendant, he being a householder and entitled to such exemption, the judgment defendant may replevy the same. The fact that the property was mortgaged did not deprive defendant of the right to have the same exempted.

SHERIFF'S SALE.—*Notice of Recorded Mortgages.—Presumption of Duty Performed.*—The sheriff is bound to take notice of recorded mortgages, and he must require the purchaser to comply with the conditions thereof before placing him in possession, and in that regard it will be presumed that the sheriff did his duty.

From the Monroe Circuit Court.

J. R. East and R. G. Miller, for appellants.

A. M. Cunning and H. A. Lee, for appellee.

Lortz, J.—This was an action to recover the possession of certain personal property, brought by the appellee against the appellants. The facts as found by the court are briefly as follows: The appellant Hollenbeck recovered a judgment in the Monroe Circuit Court against the appellee and another. The cause of action on which it was based grew out of a contract. A writ of execution was issued on said judgment and came into the hands of the appellant Adams as sheriff of said county, who levied upon, and took into his possession, the property in controversy. The appellee being a resident householder, and entitled to the benefit of the exemption laws, after the levy and before sale, presented to the sheriff a schedule of all his property of every description

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whatever, and demanded that the property described in the complaint be set off to him as exempt from execution. The property was appraised as required by law, but the sheriff refused to set the same off to appellee. At the time of the levy, there was a chattel mortgage upon the property for the sum of \$1,000, executed by the appellee to George A. Woodford & Co. This mortgage was duly recorded, and provided that upon the breach of conditions therein the property should become the absolute property of Woodford & Co. The court found that there was a breach of conditions, but there is no finding that Woodford & Co. ever exercised their right to take possession, or claimed the property under the conditions broken. The value of the property was found to be \$325. There is a finding that the sheriff duly advertised, and sold the property under the levy, and that the appellant Hollenbeck became the purchaser thereof for the sum of \$230, but there is no finding that the property was not in existence, or could not be returned to the rightful owner at the time of the trial. The court rendered judgment directing the return of the property and \$25 damages for the detention, or in lieu thereof, that the appellee have personal judgment against both of the defendants for the value of the property.

Several errors are assigned, but the only one discussed by appellant's counsel is the overruling of the motion to modify the judgment. Whatever other errors may exist in the judgment and proceedings they are waived by a failure to present them.

The motion to modify requested the court to render judgment for nominal damages only. The contention is that appellee's interest in the goods was only the equity of redemption from the mortgage of \$1,000; that this equity of redemption was the only thing the sheriff could levy on and sell; that this was of no value, and that there-

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fore only a nominal personal judgment should be rendered. Goods and chattels mortgaged or pledged as security for a debt may be sold on execution subject thereto, but the purchaser is not entitled to the possession until he complies with the conditions of the mortgage or pledge. Section 734, R. S. 1894.

The sheriff is bound to take notice of recorded mortgages, and it is his duty to require the purchaser to comply with the conditions of the mortgage before placing him in possession. *Collins v. State, ex rel.*, 3 Ind. App. 542.

There is no finding that the sheriff did not require the purchaser to comply with the conditions of the mortgage. In the absence of such finding, the presumption will be indulged that the officer did his duty and that he realized from the sale the sum of \$230. If he did so, the appellants would not be entitled to have the judgment reduced to a mere nominal personal judgment. But aside from this the appellee, under the findings, was entitled to have the property set off to him as exempt from execution. The fact that it was mortgaged did not deprive him of this right. The appellants were in the wrong in retaining the possession of the property under the circumstances. They can not shield themselves behind a condition broken of the mortgage, for that is a privilege personal to the mortgagee alone. A privilege of which he may or may not avail himself, and certainly can not be invoked by one who is not a party to the mortgage.

Judgment affirmed.

Filed Jan. 31, 1895.

The Western Union Telegraph Company v. Stratemeier.

No. 1,270.

THE WESTERN UNION TELEGRAPH COMPANY v. STRATEMEIER.

APPELLATE COURT PRACTICE.—*Appellate Court will not Review its Decision on Subsequent Appeal.*—Where the appellate tribunal has passed upon the sufficiency of a paragraph of pleading, it will not review such decision on a subsequent appeal.

DAMAGES.—*Excessive.*—*Failure to Deliver Telegram.*—That the damages assessed for failure to deliver telegram announcing death of member of family are not excessive, see opinion.

SPECIAL FINDING.—*Instructions to Jury.*—*Harmless Error.*—Where a special finding is requested, the giving of an instruction which could not have affected the verdict was harmless.

SAME.—*Sufficiency of Finding.*—*As Strong as Pleading.*—Where a pleading has been held good on demurrer, and the facts found are as strong as they are pleaded, the finding is sufficient.

From the Ripley Circuit Court.

J. M. Butler, A. H. Snow and J. M. Butler, Jr., for appellant.

C. K. Bagot and J. H. Connelly, for appellee.

DAVIS, J.—This cause is here for the second time. *Western Union Tel. Co. v. Stratemeier*, 6 Ind. App. 125. There has been no change in the issues since that decision, except the third paragraph of the answer and the seventh paragraph of the reply were withdrawn before the last trial. The facts are so fully stated in the opinion cited that it is not necessary to repeat them here.

The errors assigned are:

1. The overruling of the demurrer to the fourth paragraph of reply.
2. The overruling of appellant's motion for a new trial.
3. The overruling of appellant's motion for a *venire de novo*.

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4. The overruling of appellant's motion for judgment and sustaining appellee's motion for judgment.

It is conceded that the fourth paragraph of the reply referred to in the assignment of errors and discussed by counsel, is the same paragraph of reply referred to in the former opinion hereinbefore cited as the third paragraph. This court then held the paragraph in question sufficient, and we can not, on this appeal, review that decision.

Counsel insist that the damages, five hundred dollars, awarded by the jury, are excessive. In answer to this we quote the language of Judge REINHARD, in *Western Union Tel. Co. v. Newhouse*, 6 Ind App. 442, as follows:

"Damages for mental anguish being recoverable, the proper amount to be assessed is a matter that must necessarily be left largely to the sound judgment of the jury, under the directions of the court. We can not say that \$400 was too much in the present case, or that such an amount, under the facts of this case, appears to be the result of prejudice, partiality or corruption on the part of the jury, and which, at first blush, impresses one as outrageous and excessive."

Counsel insist that the special verdict is not sustained by sufficient evidence. We have carefully read the record and quote with approval what was said by Judge CRUMPACKER in his opinion on the former appeal, as follows:

"Indeed every essential proposition necessary to support the judgment is fairly authorized by the evidence, and the judgment can not be disturbed upon this assignment." *Western Union Tel. Co. v. Stratemeier, supra.*

Counsel contend that the court erred in giving general instructions after a special verdict had been requested. Particular reference in this connection is made to the eleventh instruction. This instruction is in substance and to the effect that if the facts set out in the fourth

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paragraph of the reply were satisfactorily established by the evidence it was not necessary to find the facts averred in the second paragraph of the answer. In other words, the facts pleaded in the second paragraph of the answer were recognized throughout the trial as sufficient, if not avoided, to constitute a complete bar to the action, but the court instructed the jury that this defense was not available in behalf of appellant, if the estoppel pleaded in the fourth paragraph of the reply was proven. Inasmuch as the jury found and returned, in their special verdict, the facts constituting the estoppel, as pleaded in the fourth paragraph of the reply, we fail to see how appellant was injured by the failure to find the facts pleaded in the second paragraph of its answer. If the instruction had not been given, and the facts pleaded in the answer had been fully found in favor of appellant, the final result, in the light of the other facts found in the verdict, would inevitably have been the same.

Counsel next insist that the motion for a *venire de novo* should have been sustained, because the special verdict is so defective, uncertain, and ambiguous, that no judgment can be rendered thereon. The point made in argument is that the verdict fails to state with sufficient clearness the facts which are claimed to estop appellant from setting up its defense of exemption from liability. The facts found in the verdict are fully as strong as they are pleaded in the reply, and if the reply is good as against the demurrer the verdict is sufficient, on this point, so far as the motion for a *venire de novo* is concerned.

Counsel also contend that the court erred in overruling appellant's motion for judgment, because the special verdict fails to find the facts alleged in the second paragraph of the answer. As we have seen, if it was conceded that the facts were true as alleged in the second

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paragraph of the answer, the result would be the same. What we have heretofore said in discussing the instructions disposes of this question.

We find no reversible error in the record.

Judgment affirmed.

Filed Jan. 11, 1895.

1,396.

KIBLER, ADMINISTRATOR, v. POTTER.

DECEDENT'S ESTATE.—*Evidence.—Declarations of Claimant in Presence of Decedent.—Conclusiveness of Witness's Statement as to Presence of Deceased.*—Where a witness on behalf of the estate testifies to a conversation had between him and the claimant, in the presence of the decedent, the statute makes the evidence of the witness conclusive as to the presence of the deceased, and that fact can not be rebutted.

From the Tipton Circuit Court.

F. M. Butler, for appellant.

R. B. Beauchamp and W. W. Mount, for appellee.

GAVIN, J.—The appellee filed a claim upon two notes executed by appellant's decedent and recovered thereon. Upon the trial the appellant proved, by one Lawley, certain statements made by appellee to him in the presence of the deceased and at the time of her acquiring an interest in the deceased's business by virtue of a contract then executed. The appellee, in rebuttal, was placed upon the stand and permitted to testify to a conversation with the witness about the same subject-matter, but of an entirely different purport and wholly inconsistent with that recounted by him, which, she says, occurred immediately after the business transaction above referred to, and

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after the decedent had gone away and was no longer present.

The correctness of this ruling is properly presented for our consideration. *Davee v. State ex rel.*, 7 Ind. App. 71; *Gish v. Gish*, 7 Ind. App. 104.

Section 506, R. S. 1894, being section 498, R. S. 1881, if standing alone, clearly disqualifies the claimant in such suits against estates from testifying as to matters occurring during the lifetime of the deceased; but section 508, R. S. 1894, section 500, R. S. 1881, contains this provision: "Or if any witness shall, on behalf of the executor, administrator, or heirs, testify to any conversation or admission of a party to the suit, his assignor or grantor, as having been had or made in the absence of the deceased; then the party against whom such evidence is adduced, his assignor or grantor, shall be competent to testify concerning the same matter." Upon this latter section counsel rely to sustain the position of the trial court, which allowed the evidence to go to the jury, with an instruction to disregard it unless they found that the conversation occurred in the absence of the decedent.

Counsel urge that unless the claimant be heard upon this question, a dishonest witness may, by locating the conversation in the presence of the decedent, wrongfully close the mouth of the claimant. On the other hand it is urged with about equal force that if the claimant is permitted to speak, a dishonest one may locate the conversation in the absence of the decedent, and thus wrongfully obtain the benefit of his own testimony. That there is opportunity for the consummation of a wrong under either rule, is plain. The legislature, however, has, as it seems to us, cleared the way for the courts and prescribed the circumstances upon which the claimant's right to testify depends, and that is when the wit-

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ness testifies to a conversation "as having been had in the absence of the deceased." The statute makes the evidence of the witness conclusive as to the presence of the deceased. In the case in hand, the witness testifies that the deceased was present. It seems to us that the language of the statute is plain and unambiguous, and should be followed.

There are several cases in which this provision of the statute has been considered. *Cooper v. Cooper*, 86 Ind. 75; *Martin v. Martin*, 118 Ind. 227; *Copeland v. Koontz, Admr.*, 125 Ind. 126; *Nelson, Admr., v. Masterton*, 2 Ind. App. 524.

In none of these cases, however, nor in any other to which our attention has been called, has the right of the claimant to dispute the statement of the witness concerning the presence of the decedent been presented or determined.

As we have held, the letter of the law is against the claimant, and it has not been the policy of the courts to open by construction the doors against estates, but rather the contrary. *Hudson v. Houser, Admr.*, 128 Ind. 309; *Larch v. Goodacre*, 126 Ind. 224.

In our judgment, the trial court erred in permitting appellee to testify.

Judgment reversed with instructions to sustain the motion for new trial.

Filed Jan. 15, 1895.

Zimmerman v. Baur et al.

1,380.

ZIMMERMAN v. BAUR ET AL.

DAMAGES.—Excavation in Public Alley.—Violation of Ordinance.—Proximate Cause of Injury.—Where a trench is excavated in a public alley for the purpose of tapping a public sewer in violation of a city ordinance, one whose horse, in passing along the alley, steps into the excavation and is injured, can not recover therefor by reason of the violation of the ordinance, such breach of duty not being a proximate cause of the injury.

SAME.—Right of Abutting Owner to Dig Trench in Alley.—Consent of Municipal Authorities.—Ordinance Prohibiting Excavation.—Proof of.—An abutting property-owner may dig a trench in a public alley for the purpose of making a sewer connection without the consent of the municipal authorities, unless there is an ordinance to the contrary, and the existence of the ordinance must be made to appear by the party having the burden of proof.

SAME.—Negligence.—Independent Contractor.—Where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the contractor.

SAME.—Respondeat Superior.—When Does Not Apply.—Case Stated.—Where A. grants to his neighbor, B., a license to connect with the former's private sewer—a work neither dangerous nor a nuisance—and B. employs C. to do the work, the relation between A. and C. does not admit of the application of the rule *respondeat superior*.

From the Vigo Circuit Court.

P. M. Foley, J. C. Foley and I. N. Pierce, for appellant.

T. W. Harper, J. G. McNutt and C. McNutt, for appellees.

REINHARD, J.—Zimmerman sued Jacob Baur, Charles Baur, Herman Moench, George Moench, Charles Moench, Bertha Moench, Lilly Moench and Andrew Farnham for damages for an injury to a team of horses sustained from the alleged negligence of said parties in connection with

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the construction of a sewer in the city of Terre Haute. The complaint is in three paragraphs. It appears from the averments in the first paragraph of the complaint, that Jacob and Charles Baur were the owners and managers of a stable for feeding and keeping horses on the south end of lot 54, in Rose's addition to the city of Terre Haute, and had contracted with Zimmerman to keep his buggy and "a match team of fine blooded horses, trained and noted for their gait and speed as trotters and travelers," each of which was of the value of \$1,500, at said stable, and to feed the said horses therein, and allow him, at reasonable hours, to drive them into and out of said stable at the south door thereof, at the rate of \$50 per month; that in order to go into and out of said stable to Seventh street, in said city, and westward of said stable, it was necessary for Zimmerman, the appellant, to pass in and out of the door on the south side of said stable to, over, and along an alley in said city running east and west and along the south side of said stable to Seventh street, said alley being a public alley of and in said city; that the appellees Moench were also the owners of a lot located seventy-five rods west of said stable, the south end of which fronts on said alley; that all of said parties (the defendants below), being desirous of letting and obtaining the building and construction of a sewer from the south end of the Moench lot eastward and through said alley to and in front of the said stable, did then and there dig said sewer to a depth of four feet and a width of two feet along the whole of said distance; that in the digging and constructing of said sewer, they negligently and carelessly dug and constructed the same in front of and near to the said stable, so that the same was left insecurely filled and packed, but apparently safe, secure and filled,

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as it appeared on the surface of the ground and earth. Then follow allegations that appellant drove his horses out of the stable and along the public alley, and that while so driving them, one of the horses stepped into the excavation so left insecurely filled and packed as aforesaid, whereby said horse was permanently injured, to the appellant's damage. It is also averred that the appellant was without fault.

The second paragraph is the same as the first, except that instead of charging the defendants with negligently digging the sewer so that it was left insecurely packed and filled, but apparently safe, it is charged "that in the digging, construction and making of said sewer the defendants, without the permission of the city of Terre Haute, wrongfully and unlawfully constructed and dug the same in and through said alley in front of and near to the said stable, so that the same was left insecurely filled and packed, but apparently safe and secure, as the same appeared on the surface of the ground and earth."

The third paragraph is the same as the first, except as to the charge of negligence, which is as follows:

"That on the 21st day of September, 1880, the common council of the city of Terre Haute passed and adopted an ordinance in relation to the public sewers of the said city; that said ordinance ever since has been and is now in full force and effect; that section four of said ordinance is in the words and figures as follows, to wit:

"'Right to drain. (Sec. 4.) Any person having the right to tap any public sewer, who shall, by means of pipes or other communication, drain the cellar or vaults situated upon the property adjacent to their own, shall, upon conviction thereof before the mayor, be fined in any sum not exceeding \$100, and upon a second con-

viction for the same offense, shall be debarred from the further right to drain into said sewer.'

"That on the 17th day of August, 1889, the defendants, the said Baur, having the right to tap a public sewer of said city, did so tap a public sewer of said city, and did connect therewith and drain and run therein a private sewer, of which the defendants, the Baur, were the owners and controllers, and for the purpose of draining the cellar and vaults upon their property of their co-defendants, the said Moenchs, said property being adjacent to the said property of said defendants Baur, all of said defendants, without the permission of the city of Terre Haute, wrongfully and unlawfully, and for the wrongful and unlawful purpose of draining the cellar and vaults of the defendants Moench, as aforesaid, did, on the — day of —, 1889, construct and dig, and allowed, permitted, and advised the construction of a pipe sewer from the south end of said lot so owned by the defendants Moench, eastward and along said alley to and in front of said stable."

The action was subsequently dismissed as to Farnham. The other defendants answered in three paragraphs, the first of which was the general denial.

The second paragraph of the answer was by all the remaining defendants, and is as follows:

"Defendants, for further answer and cause of defense to each paragraph of plaintiff's complaint, say that the said defendants Moenchs contracted with one Andrew M. Farnham, a careful, experienced and competent builder of sewers, to dig the trench and build the said sewer, and to do all necessary work in tapping the sewer mentioned in the complaint, and to furnish all the necessary materials and labor in constructing said sewer for said Moenchs; that defendants Moenchs agreed to pay the defendant Farnham therefor the sum of sixty dollars; that

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the said Farnham did furnish the materials and labor for the construction of said sewer for said Moenchs, and personally superintended the building thereof; that neither of these defendants had any control of the building of said sewer, either in person or by agent, but that the said sewer so built by said Farnham was delivered to the said Moenchs completed for said sum of sixty dollars, and defendants say that the alleged injury to plaintiff's horse was caused by the negligence of the said Farnham or the men employed by him. Wherefore," etc.

The third paragraph is the separate answer of Jacob Baur and Charles Baur, and is as follows: "The defendants, Jacob and Charles Baur, for their third and separate answer herein to each paragraph of complaint, say that at the time alleged in the complaint the said Baur, with several other persons, were the owners of a private sewer in the city of Terre Haute, which said private sewer ran through the alley in the rear of lot 54, in Rose's addition to the city of Terre Haute; that their co-defendants, Herman, George, Charles, Bertha and Lilly Moench, being desirous of building a private sewer for their own exclusive benefit, and being desirous of having a convenient outlet for said sewer, and being desirous of tapping the said sewer of the said Baur and others, paid to the said owners of said sewer, including said defendants Baur, the sum of \$35, in consideration of which the said Baur and the other owners of said sewer orally granted to the said Moenchs the right and privilege of tapping said sewer at a point in said alley in the rear of said lot 54, and at a point on said lot so owned by said defendants Baur; that further than this the said defendants Baur had nothing whatever to do with the sewer built by the said Moenchs or with the tapping of said sewer owned by said Baur and others, or with the alleged negligent conduct set forth in the complaint."

Then follow allegations substantially the same as those of the second paragraph of answer, that the Moenchs employed Farnham, who was an independent contractor, and had the sole supervision of the building of said sewer.

A several demurrer was filed to the second and third paragraphs of the answer, and overruled. The appellant having refused to plead further, judgment was rendered in favor of the appellees, and the only errors relied upon relate to the ruling of the court upon the demurrer to the answer.

It appears that each paragraph of the affirmative answers is addressed to each paragraph of the complaint. It is insisted by appellant's counsel that the third paragraph of the complaint is clearly bad, and hence that so far as the answers attempt to meet this paragraph they must be held sufficient under the rule that a bad paragraph of answer is good enough when addressed to a bad paragraph of a complaint. *Ice v. Ball*, 102 Ind. 42.

It is further insisted by appellant's counsel that the gist of the negligence charged in the third paragraph of the complaint is the construction of the sewer in violation of a city ordinance, and that the appellant has failed to show by this pleading that by such violation the appellees were guilty of a breach of duty which they owed to the appellant. Without deciding whether the violation of the city ordinance constitutes the *gravamen* of the charge of negligence contained in the third paragraph of complaint, or whether the pleading could be upheld upon the other averments of negligence therein charged, it is sufficient for our purpose to state that the entire complaint contains three specifications of negligence, viz.:

1. Negligently leaving the sewer excavation insecurely packed and filled.

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2. Negligently constructing the sewer without the permission of the city.

3. Negligently constructing the sewer in violation of the city ordinance.

In order to determine whether it is necessary for the answer to meet the last specification of negligence, in order to render such answer sufficient upon demurrer, it will be proper to ascertain whether such last specification of negligence is itself sufficient to make a cause of action against the appellees and in favor of the appellant.

A party is, as a general rule, entitled to recover damages for an injury resulting from the negligence of another only when it appears that the person complained of has done or omitted to do some act or acts in violation of some duty owing from him to the complaining party. *Hamilton v. Feary*, 8 Ind. App. 615; *Howe v. Ohmart*, 7 Ind. App. 32.

It is not sufficient that the defendant in an action of negligence was guilty of a breach of legal duty to somebody or anybody; it must be made to appear that the duty which the defendant failed to perform was one legally owing by the defendant to the plaintiff, although of course the plaintiff may be only one of a large number of persons to whom the same duty is owing. This duty may arise by implication of law, or it may be one directly created by statute. Among the duties designated as statutory are included those created by ordinances of cities and towns, as, for example, where an ordinance prohibits the suspension of sign-boards over the streets or sidewalks, and an injury is caused by the violation of such ordinance, the defendant will be liable in damages, though he used due care in constructing and fastening the sign. *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 358.

Ordinances regulating the speed of trains and the

sounding of whistles and ringing of bells on locomotives running in cities and towns or other localities, furnish, perhaps, the most numerous examples of special duties created by statutes, the breach of which entitles the party injured thereby to damages.

In determining whether or not a right of action exists in one who has sustained an injury from the violation of an ordinance, the purpose or object of the enactment must not be lost sight of, as here the question of what may be considered in law as the proximate cause of the injury forms an important element.

The third paragraph of the complaint, and the ordinance set forth therein, plainly contemplate or presuppose that the appellees, as owners of the property abutting on the alley in question, had the right to tap a public sewer in the city of Terre Haute, and this necessarily included the right to make the necessary excavation through the alley and connection with such public sewer by means of a private sewer. Indeed the pleading under consideration states in express terms that the defendants Baur, having the right to do so, "did so tap a public sewer of said city, and did connect therewith, and drain and run therein a private sewer, of which the defendants Baur were the owners and controllers." It is not averred that this private sewer was itself constructed by the Baur for the unlawful purpose of draining the cellar and vaults of the appellees Moench, and the presumption must therefore be conclusive that it was constructed for a lawful purpose. The clear implication is, from the averments following the above, that the several defendants, with the special permission and consent of the Baur, tapped the private sewer of the latter, by means of a pipe sewer, so as to drain the cellar and vaults of the Moenchs into the private sewer of the Baur, without the permission of the city. It is not shown whether the

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Baur sewer was in existence when the Moench trench was dug, or whether both of these private drains were being constructed simultaneously. Assuming, however, that the Moench ditch, which is characterized as the unlawful one, was the one which occasioned the injury to the appellant's horse, the question recurs whether the act alleged to have been committed by the several defendants, and which was forbidden by the ordinance, created a right of action in the appellant for damages.

It was manifestly the intention of the city, in enacting this ordinance, to prohibit the use, direct or indirect, of any public sewer by persons who had not paid their share of the burden of its maintenance and operation, and, perhaps, also, to prevent the overloading of both the public and private sewers and the consequent danger that might result to the property of citizens from an overflow of sewerage. These were the only mischiefs sought to be prevented, and if the appellant can recover, it must be because he was injured through the negligent or unlawful act of the appellees, or some of them, in draining a cellar and vault situated upon some lot adjacent to their own. In other words, if the appellees, or any of them, owed the appellant a duty under the ordinance, it was the duty of not draining a cellar or vault located on property adjacent to their own, and, as the appellant does not claim to own any property which was injured by such alleged unlawful drainage, it is not easy to see how he could have been injured by the act constituting the violation of the ordinance relied upon.

The only manner in which we can conceive any injury to have been sustained as the proximate result of a violation of the ordinance is from an overflow of water or other drainage unlawfully conducted into or over the private sewer of the Bours, but it is not claimed that appellant sustained any injury of that character.

But to say that the ordinance was intended to protect the appellant and others who might have occasion to use the alley as a driveway, against such an accident as befell his horse, would be, to our minds, a far-fetched and unwarranted construction.

In *Williams v. Chicago, etc., R. W. Co.* (Ill.), 26 N. E. Rep. 661, the action was for injury resulting from the alleged negligence in sounding the whistle or ringing the bell, as required by statute, alleged to have been sustained by a farmer who was plowing in a field near the crossing where the whistle was required to be sounded and the bell rung. It was held that the action would not lie. The court said: "In order to justify a recovery, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect."

And again, it was said: "It is manifest that the plaintiff in the present case did not belong to the class for whose benefit the railroad companies are required to give the signal. Unquestionably, the defendant neglected no duty which it owed to the plaintiff, under the circumstances set up in the declaration. Plaintiff was not traveling upon the highway, either at the crossing or before reaching the crossing.* He was not even upon a highway running parallel with the track. He was plowing on the farm near the railroad right of way."

The Supreme Court of Kansas made similar holdings in cases where one traveling upon another road or street than that where the engine was to cross claimed to have suffered injury by reason of the failure of the railroad company to sound the whistle of its running engine, as it was required to do by statute. *Clark v. Missouri Pac.*

R. W. Co. (Kan.), 11 Pac. Rep. 134; *Missouri Pac. R. W. Co. v. Pierce*, 33 Kan. 61.

In the latter case, the court used this language: "The purpose of the Legislature in requiring this warning to be given before reaching a highway, is manifestly to afford protection to persons or property that may be upon, or passing over such highway and therefore the omission of the company to comply with this statutory requirement can not be held to be negligence as to any injury done except at the crossing of the particular highway for which the whistle is required to be sounded. The company owed no duty under this statute to parties crossing Locust street, within the limits of Paola, which is a city of the second class."

To the same effect, see *Byrne v. New York, etc., R. R. Co.*, 94 N. Y. 12.

It has also been held that where an ordinance is adopted which is a mere police regulation, such as requires the owner of a lot to remove snow and ice from the sidewalk in front of such lot, within a certain time after accumulation, one who falls on account of the bad condition of such sidewalk, owing to the accumulation of snow and ice and the failure to remove the same as required, can not recover damages from the owner of the lot. *Moore v. Gadsden*, 93 N. Y. 12; *City of Rochester v. Campbell* (N. Y.), 25 N. E. Rep. 937.

Whether the doctrine enunciated in the cases last cited would be adhered to in its full extent by the courts of this State, we need not determine, as we have here no such case presented. We think it clear beyond controversy that under the provisions of the section of the ordinance relied upon the appellant had no right of action, and that consequently no harm could have resulted from any ruling upon a demurrer addressed to or intended to meet this alleged negligence.

Nor do we think it was necessary, under the averments of the answers, when considered in connection with those in the several paragraphs of the complaint, that any permission from the city should be obtained to entitle the appellees to make the excavation required to connect with the public sewer. There is nothing averred in the complaint, aside from the ordinance set out in the third paragraph, which shows that the appellees, or any of them, were prohibited by ordinance or otherwise from making such connection. An abutting owner does not surrender all his right and interest in the soil of a street or alley by its dedication to the public. He is still the owner of the fee simple to the center of such street or alley, subject only to the easement of the public. The owner of the servient estate has a right to the temporary use of such street or alley for many purposes. Thus, among other things he may do upon such street or alley is the laying of pipes for gas and water, and he may excavate and use the soil for this and many other purposes, if it does not interfere with the free use or passage over it by the public. *Halsey v. Rapid Transit St. R. W. Co.*, 20 Atl. Rep. 859; *Dillon Munic. Corp.* (4th ed.), section 656, *a*.

In none of these instances is he required to obtain the consent of the municipality unless the same be required by some ordinance, and if so this fact must be made to appear by the party upon whom rests the burden of proof. Of course such owner is in no case permitted to erect and maintain a nuisance or do anything which permanently obstructs travel upon any highway, and he is also required, when reasonably necessary, to place safeguards or warning signals near or around any excavation or temporary obstruction which he may lawfully have placed in the highway. But for the purpose of making the sewer connection, he was not required to have

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the consent of the city, as he still retains his common-law interest in the soil. Elliott Roads and Streets, p. 524 and p. 521, n. 3; *Lahr v. Metropolitan, etc. R. W. Co.*, 104 N. Y. 268; *Town of Rensselaer v. Leopold*, 106 Ind. 29; *Fisher v. Thirkell*, 21 Mich. 1; *Clark v. Fry*, 8 Ohio St. 358.

The remaining question is whether the averments in the first and second paragraphs of the answer, showing that the negligence, if any, was that of an independent contractor, are sufficient as a defense to the cause of action declared upon. It is sufficiently apparent from these answers, we think, that the excavation and construction of the private sewer in the alley was not unlawful in itself.

The second paragraph of the answer shows that the appellees Moench contracted with Farnham, who, it is alleged, was a careful, experienced and competent builder of sewers, to do the entire work, and that he took charge of the same, and appellees had nothing to do with it. This was a sufficient answer to all the good averments of the several paragraphs of the complaint. *Ryan v. Curran*, 64 Ind. 345.

"It seems to be settled law that where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." *Vincennes Water Supply Co. v. White*, 124 Ind. 376 (379).

The same rule was declared substantially in *New Albany, etc., Mill v. Cooper*, 131 Ind. 363.

The third paragraph of the answer, as we have seen, is the separate answer of the appellees Baur, and shows that they simply granted the appellees Moench the right

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to tap their private sewer, and that the latter employed Farnham to do the work, as alleged in the second paragraph. There being no right of action in the appellant for the alleged violation of the ordinance, and the consent of the city not being necessary in order to make said connection, and the excavation and work not being intrinsically dangerous, or a nuisance, the averments of this paragraph, that the appellees Baur had no connection with the work, except the granting of such license to the Moenchs, there was no such relation between Farnham, the contractor, and the said Baur as made the rule *respondet superior* applicable. We are, therefore, of opinion that each paragraph of the affirmative answers stated a valid defense to that portion of the appellant's cause of action which was well pleaded in any or all the paragraphs of his complaint.

Judgment affirmed.

GAVIN, J., was absent.

Filed Dec. 19, 1894.

No. 1,065.

BEUGNOT ET AL. v. THE STATE, EX REL. COAL.

NEW TRIAL.—*Reasons for Should be Definite and Specific.*—*Appellate Court Practice.*—Reasons assigned in a motion for a new trial must be sufficiently definite and specific that on appeal the error complained of may be readily found, so as not to impose upon the court the task of searching the record for the alleged errors.

APPELLATE COURT PRACTICE.—*Burden Upon Appellant to Present a Record Showing Prejudicial Error.*—The burden is upon the appellant to present a record which affirmatively shows the commission of an error by the court below, prejudicial to the rights of appellant; and to make such a showing there must be no uncertainty or contradiction on that question on the face of the record.

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SAME.—Case Fairly Tried.—When Judgment Will Not be Reversed.—

Where the case appears to have been fairly tried, the appellate tribunal will not reverse the judgment where the error complained of is not clearly and definitely shown on the face of the record.

From the DeKalb Circuit Court.

C. E. Emanuel and *W. L. Penfield*, for appellants.

J. E. Rose, *J. H. Rose* and *C. A. O. McClellan*, for appellee.

Ross, C. J.—The appellee sued and recovered judgment in the court below, against the appellants, on a retail liquor dealer's bond executed by the appellant Joseph E. Beugnot as principal, and the other appellants as his sureties.

Although the appellants have assigned a number of reasons in their assignment of errors for a reversal of the judgment appealed from their argument is confined, except indirectly, to a discussion of questions only which arise under the fourth assignment, viz.: That the court erred in overruling the motion for a new trial.

The condition of the record as it comes to us is very unsatisfactory, and not only imposes upon the court considerable labor which would have been obviated had the record been properly made, but also leaves serious doubts as to whether or not the questions discussed are properly presented.

Whether this uncertain condition of the record is the result of some error or oversight of the clerk or the indefiniteness of the original bill of exceptions is not disclosed.

It is a settled rule of both this court and of the Supreme Court that reasons assigned in a motion for a new trial must be sufficiently definite and specific that on appeal the error complained of may be readily found so as not to impose upon the court the task of searching

the record for the alleged error. *Knisely v. Hire*, 2 Ind. App. 86; *Reese v. Caffee*, 133 Ind. 14.

On appeal to this court the burthen is upon the appellant to present a record which affirmatively shows the commission of an error by the court below, prejudicial to the rights of the appellant. This is true because every reasonable presumption is indulged in favor of the correctness of the rulings of the lower court. To present such a record as will show affirmatively that an erroneous ruling adverse to appellant has been made, there must be no uncertainty or contradiction on that question on the face of the record. Otherwise the rule obtains that the court's rulings were right, and the record failing to show affirmatively and uncontradicted that an erroneous ruling was made, no question arises for review on appeal.

We think the second paragraph of the complaint in this case states a good cause of action. A similar complaint was held good by the Supreme Court in the case of *The State, ex rel., v. Cooper*, 114 Ind. 12.

The reasons in the motion for a new trial based upon the rulings of the court in giving and refusing instructions are not as clear and definite as the construction of the rules of the Supreme Court as announced in a number of cases would sustain. *Sutherlin v. State*, 108 Ind. 389; *Ohio, etc., R. W. Co. v. McCartney*, 121 Ind. 385.

We have, however, examined and considered carefully all the instructions given, and while the objections urged by counsel against some of them are plausible, and had they been the only instructions given, they might have been considered harmful, when they are considered in conjunction with the other instructions given, we think it must be considered that their general tendency was as favorable to appellants as they had any right to ask or

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expect. As to the rights of the jury in considering the evidence, and what it was necessary for the plaintiff to prove to entitle her to recover, the court was very explicit in its instructions. The instructions on this branch of the case were plain, easily understood, and directly applicable to the evidence admissible under the issue.

The case seems to have been fairly tried. Under such circumstances this court will not reverse a judgment, especially when the ruling complained of as erroneous is not clearly and definitely shown on the face of the record.

The statute specially provides that no judgment shall be reversed where it shall appear to the court that the merits of the cause under the issues properly formed have been fairly tried and determined in the court below. Section 670, R. S. 1894.

The statute has been held to apply in a number of cases where the question urged for a reversal was the same as in this case. *Simmon v. Larkin*, 82 Ind. 385; *Cassady v. Magher*, 85 Ind. 228; *Norris v. Casel*, 90 Ind. 143; *Ledford v. Ledford*, 95 Ind. 283; *Stockwell v. Brant*, 97 Ind. 474; *Perry v. Makemson*, 103 Ind. 300; *Sanders v. Weelburg, Exx.*, 107 Ind. 266; *State, ex rel., v. Ruhlman, Exx.*, 111 Ind. 17; *Woods v. Board, etc.*, 128 Ind. 289.

Judgment affirmed.

Filed Jan. 29, 1895.

No. 1,392.

GERMAN MUTUAL INSURANCE COMPANY v. NIEWEDDE.

FIRE INSURANCE.—*Clause Forfeitting Policy if Property Insured is Incumbered, Valid.*—A provision in a policy of insurance providing that it shall be void if there is an incumbrance upon the property insured on the date of the issuance of the policy, is valid.

SAME.—*Enforcing Forfeiture.—Construction.*—Courts are averse to giving effect to forfeitures, and construe the contract of insurance most strictly against the insurer, resolving all doubts in favor of the insured.

SAME.—*Waiver of Terms of Policy.—Forfeiture, Rule of Construction.*—Valid and enforceable provisions of a contract of insurance may be waived not only by express agreement, but by the conduct of the insurer; and in determining whether a harsh and inequitable forfeiture clause is to be deemed waived, the courts generally apply the same liberal rule in favor of the insured as governs in the construction of the contract itself.

SAME.—*Incumbrance, When Will Not Avoid Policy.—Waiver by Failure to Inquire.*—If there be no written application for insurance, no questions asked, no statements made, and no knowledge by the assured that the existence of the incumbrance on the property insured works a forfeiture of his insurance, the insurer is deemed to have waived the provision of the policy against an incumbrance.

From the Jackson Circuit Court.

R. Applewhite, J. F. Applewhite, A. Seidensticker, J. E. McCullough and H. N. Spaan, for appellant.

W. H. Endebrock, A. N. Munden, W. K. Marshall, B. H. Burrell and L. F. Branaman, for appellee.

GAVIN, J.—The appellee's complaint sought to recover for the loss of a stock of goods by fire, against which it was insured by appellant. The answer was a general denial, and in addition thereto that there had been a breach of the condition of the policy by an existing incumbrance. To this answer appellee pleaded a waiver of the condition.

The general verdict was for appellee, with various an-

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swers to interrogatories, upon which judgment was rendered in his favor over appellant's motion for new trial.

From the evidence it appears that the appellee made oral application for the policy, no written application being required. The agent agreed to issue the policy, and the premium was paid, but no policy was then delivered, it being afterward sent by mail. The appellee testifies that no questions were asked as to mortgages or incumbrances, and no statements made relative thereto by him; that he did not see the policy at the time and did not know a mortgage would invalidate the policy by its terms. The agent, however, testified that when a former policy was issued, he had told appellee that he was prohibited by this company from taking mortgaged property, and on his application for this policy he asked him if everything was the same as before, and he said yes.

When the policy was issued, the property, worth about \$4,700, was subject to a mortgage for \$528, executed about a month before, and duly recorded, which remained unpaid at the time of trial, but appellant had no knowledge of its existence until after the loss. The policy contained a provision of forfeiture if the property was incumbered unless so represented and expressed in the written part of the policy.

That this provision is valid and enforceable, can not be controverted. *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106; *Continental Ins. Co. v. Vanlue*, 126 Ind. 410; *Continental Ins. Co., etc., v. Kyle*, 124 Ind. 132; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172.

While the courts are averse to giving effect to forfeiture clauses, and will construe the contract most strictly against the company, resolving all doubts in favor of the policy-holder, we are not authorized to make a new con-

tract for the parties, nor to disregard that which they have themselves created. *Continental Ins. Co. v. Van-lue, supra*, and authorities above cited; *Dover Glass Works Co. v. American, etc., Co.* (Del.), 29 Atl. Rep. 1039.

It is, however, equally the law that the valid and enforceable provisions of the contract may be waived, not only by express agreement, but by the conduct of the company. *Evans v. Queen Ins. Co.*, 5 Ind. App. 198; *Home Ins. Co., etc., v. Marple*, 1 Ind. App. 411; *Sweetser v. Odd Fellows, etc., Assn.*, 117 Ind. 97; *Havens v. Home Ins. Co.*, 111 Ind. 90.

In determining whether a harsh and inequitable forfeiture clause, such as we have here, is to be deemed waived, the courts have generally applied the same liberal rule in favor of the insured as governs in the construction of the contract itself.

That knowledge of the fact which, by its terms, would avoid the policy, is a waiver of such provision, is conceded by appellee's learned counsel. *Havens v. Home Ins. Co., supra*; *Phenix Ins. Co., etc., v. Lorenz*, 7 Ind. App. 266.

But counsel insist that nothing short of actual knowledge will suffice to accomplish this result.

In this view of the law they are not sustained by the weight of authority, nor have they any equity upon their side.

If the law is as they assert, then the company takes and keeps the money of appellee and makes to him absolutely no return whatever.

The contract was, as appellant declares, void *ab initio*. No risk ever attached. The company hazarded nothing, it simply received appellee's money and had that much clear profit in the transaction with no chance whatever of loss. The appellee, without having in any way deceived or misled the appellant, without having had his

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attention called to the mortgage clause, with appellant apparently displaying at the time no interest whatever in the question of incumbrances, pays his money for an insurance policy expecting to get protection; relying upon appellant's failure to make any inquiry, he depends upon this policy as an indemnity in case of loss, but when the loss comes discovers that he had no insurance. If the law really requires such a holding, then our province is but to declare it.

The law, however, does not demand so inexorable an adherence to the letter of the contract under all circumstances and all conditions.

In quite a number of cases it has been adjudged that the failure of the company to inquire about or call any attention to some particular fact operates to relieve the insured from a forfeiture which would follow his omission to disclose it under the strict wording of his policy, although the fact was one material to the risk but not one unusual or extraordinary. *Clark v. President, etc.*, 8 How. 235; *Washington Mills, etc., Co. v. Weymouth, etc., Ins. Co.*, 135 Mass. 503; *Guest v. New Hampshire Fire Ins. Co.*, 66 Mich. 98.

This doctrine was expressly approved in *Continental Ins. Co. v. Munns*, 120 Ind. 30, where MITCHELL, J., says: "The rule applicable is that a failure or neglect on the part of the insured to make known facts which the insurer may regard as material to the risk, is not a breach of a condition in the policy avoiding it, in case of any omission to make known every fact material thereto, because the insured has a right to suppose that the insurer will make proper inquiries concerning all facts, except such as are supposed to be known, or are regarded as immaterial."

In these cases the fact depended upon as a forfeiture

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came within the terms of general language contained in the policy, declaring it thereby avoided.

For the purpose, doubtless, of meeting these and similar holdings, it became usual to insert in the policies special forfeiture clauses dependent upon the existence of particular facts specifically mentioned, as in the policy under consideration.

In *Short v. Home Ins. Co.*, 90 N. Y. 16, one of these policies became the subject of controversy. It was therein provided that the policy should be void if the house became or remained vacant. It was then vacant and so remained until burned. There was no written application, no questions or statements as to occupation, but there was evidence that the agent made inquiries about such matters as he deemed material, lived in the same city and had ample opportunity to learn the facts.

The court said: "It is, perhaps, a legitimate inference that he did not deem it important or material and made the insurance without regard to its occupation. At least there was some evidence in this direction, and such being the case, it was a question of fact for the jury to determine whether the defendant's agent knew the condition of the premises or regarded it as of any consequence whether the premises were occupied or otherwise, and made the insurance without any reference whatever to the subject of occupation. If he did so then the condition as to the future vacancy or non-occupation was nugatory and may be regarded as waived."

In *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, the policy provided for its avoidance if there should be "any omission of or false representation by assured of title, incumbrance," etc. Yet the court held that the company could not defend by reason of an existing incumbrance, because there was no written application, no questions

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asked nor statements about incumbrances, and the insured was wholly ignorant of the clause.

In *Hall v. Niagara Fire Ins. Co.*, 53 N. W. Rep. 727, the policy was by its terms to be void "unless consent in writing was indorsed thereon, if the insured should not be the sole and unconditional owner of the property," the owner in fee simple of the ground upon which the building stood. The court says: "It is well settled in this State, at least, that an applicant for insurance is not required to show the exact condition of his title, unless requested so to do, that the failure to mention incumbrances, if not inquired about, the application being oral and no deceit being practiced, is immaterial." It was then held that the clause could not be applied "to an existing state or condition of the property at the time that the policy was issued."

In *Wright v. Fire Ins. Assn.*, 31 Pac. Rep. 87, the policy contained a stipulation that it should be void and of no effect "if the property be a stock of merchandise and the same or any part thereof be or become mortgaged," unless the company's consent in writing should be indorsed upon the policy.

The company set up as an answer an existing incumbrance. To this the insured replied, claiming a waiver because there was no written application made by her, no question nor statements concerning incumbrances and no knowledge upon her part that the mortgage would invalidate her insurance. Under these circumstances it was decided, after quite an extended consideration of the question, that the company could not enforce the forfeiture.

In *Wilcox v. Continental Ins. Co.*, 55 N. W. Rep. 188, and *Beck v. Hibernia Ins. Co.*, 44 Md. 95, a different conclusion is reached. With much respect for the learning of the judges comprising those courts and

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the force of the logic by which they are led to their conclusions, both the weight of authority and the strong equities of the case lead us to hold that where there is no written application, no questions asked, no statements made and no knowledge by the assured that the existence of the mortgage was fatal to his insurance, the company must be deemed to have waived the provision for forfeiture by reason of the existing incumbrance.

With these views of the law, we find no error in the instructions when applied to the facts of this case. It is, therefore, unnecessary for us to determine whether those given are too broad as abstract and general statements of the law. If the evidence of Langel, the agent, is to be taken, then there was affirmative concealment. If the appellee's version of the conversations was correct, there was none, and the case comes within the rule which we have announced. This was the only one of those facts required to establish a waiver, which was in dispute. There was consequently no available error in the court's making the case hinge upon this question.

Proofs having been actually made out and delivered to the company conforming substantially to nearly all, at least, of the requirements of the policy, and the company having based its denial of liability upon other grounds, it must be deemed to have accepted the proofs furnished as a substantial compliance with the requirements of the policy.

In the *Commercial, etc., Co. v. State, ex rel.*, 113 Ind. 331, there was, as here, a general allegation of performance, supported by evidence of a delivery of proofs and denial of liability upon other grounds, but objections afterward made to the proofs.

The law was thus declared by ELLIOTT, J.: "Where proofs are delivered to the agent of an insurance company, and he denies the validity of the contract or as-

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serts that the policy has been cancelled, there is a waiver of objections to the proofs furnished."

The appellee testified in his own behalf as to the value of his stock. To contradict him and to prove the value of the stock, appellant offered in evidence his tax list duly signed and sworn to. In refusing this the court did not err, according to the holdings of our Supreme Court, which we feel compelled to follow.

In *Cincinnati, etc., R. R. Co. v. McDougall*, 108 Ind. 179, that court announced that "Such lists are, however, not competent, either for or against the lister, as original, substantive evidence, to establish the value of a particular article of property for purposes other than taxation. Such valuations are to be regarded as having been made for a special purpose, and like admissions made for a like purpose, they are not competent as original evidence of value for any other than the purpose for which they were made, or in a case involving the question of valuation for taxation."

This comes to us as the deliberate expression of the judgment of the Supreme Court, and we feel bound to give it effect so long as it stands unmodified, as it still does. It is true the court refuses there to determine whether such a list can be admitted to contradict the evidence of the party, that not being involved in the case, but we are unable to discover any ground, upon principle, for distinction between the two uses proposed to be made of this evidence. If not admissible to prove value originally, it is only because it is to be regarded as privileged, "as an admission for a special purpose." If privileged in the one instance it must be deemed privileged in the other.

The judgment is accordingly affirmed.

Filed Jan. 31, 1895.

Chapman v. The Elgin, Joliet and Eastern Railway Company *et al.*

No. 1,250.

CHAPMAN v. THE ELGIN, JOLIET AND EASTERN RAILWAY
COMPANY ET AL.

PLEADING.—Complaint.—Averments of Not Controlled by Bill of Particulars.—A bill of particulars filed with a complaint does not control the averments of the complaint which are in conflict with the bill.

SAME.—Complaint to Foreclose Laborer's Lien.—Contract.—In an action to foreclose a laborer's lien the complaint need not show the terms of the contract entered into by virtue of which the labor was performed.

SAME.—Laborer's Lien.—Sufficiency of Complaint.—That the complaint shows the work performed by plaintiff was in the county of the action, and that it sufficiently shows that plaintiff performed the labor charged in the complaint, see opinion.

From the Lake Circuit Court.

E. D. Crumpacker, for appellant.

N. L. Agnew, *D. E. Kelly* and *J. W. Youche*, for appellees.

DAVIS, J.—This suit was brought by appellant to foreclose a laborers' lien against the appellees, for work performed by appellant in the grading and building of a road-bed and embankment for the Elgin, Joliet and Eastern Railway Company. A demurrer was filed to the complaint and sustained, and judgment was rendered against appellant for costs, from which he prosecutes this appeal. The sole question for decision relates to the sufficiency of the complaint against demurrer. The action was originally brought in Porter county and carried to Lake county on change of venue.

It is averred in the complaint, in substance, that the Elgin, Joliet and Eastern Railway Company was a railroad corporation owning a line of railroad extending from the city of Joliet, in the State of Illinois, to the

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village of Porter station, in Porter county, Indiana, and that said railroad was not completed and in operation in said Porter county, between McCool station and said village of Porter, a distance of about seven miles; that the railroad company owned the right of way and had constructed a roadbed and embankment over said distance and between said stations; that said railroad company contracted with appellees Reynolds, Engle and Hannan for the construction of said railroad between said stations of McCool and Porter, in Porter county, and said contractors sublet the work to the appellee Dean, who undertook its execution; that appellant performed work and labor in grading, excavating, and constructing the roadbed and embankment of said railroad between said stations at the special instance and under the employment of said Dean as subcontractor, of the value and to the amount of \$1,117.90 during the months of November and December, 1892, and January, 1893; that said sum was due appellant and wholly unpaid, and on the 24th of January, 1893, within a period of sixty days after the performance of said work, the appellant filed and caused to be recorded in the proper record in the recorder's office of Porter county, notice of his intention to hold a lien upon said railroad and the rights, privileges and franchises thereunto belonging, for the amount due for labor upon said roadbed. A bill of particulars was filed with and made part of the complaint, as was also a copy of the notice. Judgment was asked against Dean personally and for the foreclosure of the lien against the other appellees.

The bill of particulars filed with the complaint shows the number of days of man and team-work performed by appellant for Dean on the railroad in question during the months of November and December, 1892, and

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January, 1893, giving the name of each laborer and the amount due on account of each workman.

The lien is claimed under section 6, of the act approved March 9, 1889, which provides that any person performing labor in the construction of a railroad may have a lien upon the right of way and franchises of such railroad corporation within the limits of the county in which such work or labor may be performed, to the extent of the work or labor performed by him, upon the filing of the notice of his intention, as required by law. Acts 1889, page 257, sections 7265, 7266, R. S. 1894, sections 1699, 1700, Elliott's Supplement.

Counsel for appellee make three points against the complaint:

1. They insist that it does not show that the work performed by appellant was done in Porter county.

In this view counsel, in our opinion, are mistaken. A fair construction of the averments in the complaint, when considered together as an entirety, sufficiently show that McCool station and the village of Porter are in Porter county; that the distance between the two places is seven miles, and that the labor performed by appellant was done in Porter county, on the line of the railroad between these stations.

2. It is next insisted that the bill of particulars filed with the complaint discloses that appellant was not a laborer; that he did not do the work charged in the complaint, but that he was a contractor.

Conceding, without deciding, that this is true, the objection was not reached by the demurrer. *Brown v. College Corner and Richmond Gravel Road Co.*, 56 Ind. 110 (116).

The complaint contains the averment that appellant performed work and labor in grading, excavating, and constructing the roadbed and embankment of said railroad between said stations, of the value and to the amount

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of \$1,117.90, and this averment is the controlling one. In actions upon written contracts, where the contract or a copy thereof is filed with and made part of the pleading, as an exhibit, the contents of the contract control rather than any averments of the complaint which are in conflict with the same, but this rule has no application to a bill of particulars. *Furry v. O'Connor*, 1 Ind. App. 573 (575).

3. The remaining contention is that the facts alleged do not show the terms of the contract entered into between the railroad company and the contractors, and, therefore, that it furnishes no criterion by which to measure the value of appellant's work and labor to the railroad company. This was not necessary. *Morris v. Louisville, etc., R. W. Co.*, 123 Ind. 489.

It is specifically alleged "that plaintiff performed work and labor in grading, excavating, and constructing the embankment for said railroad between said stations at the special instance and employment of said Frank Dean as such subcontractor, of the value and to the amount of eleven hundred and seventeen dollars and ninety cents," etc.

In the case last above cited Judge ELLIOTT says: "We think these acts must be so construed as to give persons who furnish materials for, or do work in, the construction of a railroad, a lien for the reasonable value of such work and materials. We can not assent to the assertion of the appellants that the contract between the principal contractor and the subcontractors furnishes the standard for measuring the extent of the lien."

Our conclusion is that the court erred in sustaining the demurrer to the complaint.

Judgment reversed.

Filed Jan. 10, 1895.

Henwood v. The State, *ex rel.* Streiby.

No. 1,438.

HENWOOD v. THE STATE, EX REL. STREIBY.

BASTARDY.—Jurisdiction of Person.—Plea in Abatement.—Burden of Proof.—Appellate Court Practice.—The burden is upon the defendant in a bastardy proceeding to establish his plea in abatement for non-jurisdiction of his person, and where there is evidence to support the finding of jurisdiction, the appellate tribunal will not determine where the preponderance lies.

From the Kosciusko Circuit Court.

S. J. North and *L. W. Royse*, for appellant.

W. H. Eiler, Prosecuting Attorney, and *J. D. Widman*, for appellee.

REINHARD, J.—On the 16th day of September, 1889, the relatrix instituted bastardy proceedings against the appellant, before a justice of the peace in Kosciusko county. A warrant issued by the justice was returned "not found." The justice proceeded with the case under the statute, adjudged the appellant to be the father of a bastard child, with which the relatrix was then pregnant, and certified the proceedings to the clerk of the circuit court. R. S. 1894, section 998. After several continuances, the appellant was arrested and brought to trial in the court below, where he filed a plea in abatement, alleging that at the time of the commencement of the proceedings before the justice and the filing of the transcript in the court below, he was not a resident of Kosciusko county, but was a resident of Fayette county, Indiana. Upon the issue tendered by this plea, there was a trial before the court and a finding against the appellant. Upon final hearing the appellant was adjudged to be the father of the relatrix's bastard child, and he was required to give bond for its support.

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The only question we are to determine is as to the sufficiency of the evidence to support the finding of the court upon the plea in abatement. The appellant insists that there was no evidence from which the court was authorized to conclude that it had jurisdiction over the person of the appellant. There was evidence tending to show that the appellant, upon learning of the pregnancy of the relatrix, left his home in Kosciusko county and remained for a time with an uncle in Wayne county; that he then went to Fayette county, and thence to Chicago, Illinois, where he remained for two years, after which he returned to Kosciusko county, where he was arrested. Whether the appellant left his home in Kosciusko county with the intention of changing his residence or not, or whether he ceased to be a resident of Indiana and became a resident of Illinois, or had no fixed residence in any county of the State, were all questions for the determination of the trial court under the evidence. If the appellant was a resident of Kosciusko county when the proceedings were instituted and when arrested, or was a nonresident of the State, or had no fixed habitation in any county of this State at these times, the court had jurisdiction over his person. *Beckett v. State, ex rel.*, 10 Ind. App. 408.

The burden was upon the appellant to establish his plea. We can not say where the preponderance of the evidence lies. This was a matter exclusively for the trial court. There was evidence from which the court had a right to find that it had jurisdiction over the appellant.

Judgment affirmed.

Filed Jan. 10, 1895.

The American Straw Board Company v. Faust.

No. 1,411.

THE AMERICAN STRAW BOARD COMPANY v. FAUST.

APPEAL.—Dismissal, Party in Interest not Prosecuting.—Appeal for Benefit of Third Person.—Where a judgment has been rendered against a party and he has appealed, making an assignment of errors in his own name, and the appellee has joined in error, the appeal can not be dismissed upon the motion of such appellee, supported by affidavit, showing that it is prosecuted in the interest of a person not a party to the record.

SAME.—Appeal for Benefit of Third Person.—Whether or not a judgment defendant prosecutes an appeal for his own benefit or for the benefit of one who has indemnified him, is not a question that can be heard or determined by the Appellate Court.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellant.

G. W. Shirts and *I. A. Kilbourne*, for appellee.

Ross, C. J.—The appellee asks that this appeal be dismissed for the following reasons, viz.:

“1st. The appellant, The American Straw Board Company, is not the real party in interest herein.

“2d. This appeal is not being prosecuted by the American Straw Board Company, but, on the contrary, is being prosecuted by the Fidelity Casualty Company, an insurance company of Detroit, Michigan, which said appeal is so being prosecuted by the said insurance company for its own benefit in the name of the said American Straw Board Company, and not otherwise.

“3d. In the event the appellant shall seek to deny or contradict the showing made and facts stated in the affidavit of appellee, filed herewith, then the appellee prays that this honorable court will appoint a commissioner herein with power and authority to take the testimony in respect to the question raised by this motion, wherein the appellee may and shall have the privilege of cross-

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examination of any and all witnesses or parties that may be produced on behalf of the appellant herein, and that the court will order that the appellant shall produce to such commissioner any and all documents or insurance policies connected with the contracts referred to in the affidavit herein filed, or any other paper that such commissioner may deem it proper to produce."

In support of the second cause contained in the motion is filed the affidavit of the appellee.

The appellant has filed what it denominates a "motion to strike out and reject appellee's motion to dismiss."

We deem it unnecessary to state the reasons embraced in this latter motion.

The record before us shows that on the 12th day of March, 1894, the appellee, Rolla M. Faust, filed his amended complaint in the court below against the appellant, The American Straw Board Company, to recover damages for personal injuries sustained by him while in its employ. Upon a trial of the cause, appellee recovered a verdict against the appellant for \$2,500, upon which the court rendered judgment.

In this court the assignment of errors is made by the "American Straw Board Company," as appellant, the party against whom the judgment was rendered in the court below. There is also a joinder in error by the appellee.

The assignment of errors is the appellant's complaint in this court, and upon it issue is joined.

Upon an appeal to this court from the judgment of a lower court, the questions which can be presented for review by the assignment of errors are only such as appear on the face of the record as filed in this court. There are questions of fact which arise subsequent to the rendition of the judgment appealed from, which it is sometimes necessary for this court to hear and determine, but

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whether or not the judgment defendant prosecutes an appeal for his own benefit or for the benefit of one who has indemnified him, is not such a question as can be heard or determined by this court. No one could take an appeal to this court from the judgment of the court below except the American Straw Board Company, and it having taken the appeal and filed its assignment of errors, its motive for so doing can not be questioned. Had an appeal been taken in its name without its knowledge or consent, and these facts had been shown in support of appellee's motion, there might be some merit in the motion to dismiss the appeal. On the contrary, it is shown by the affidavit filed in support of appellee's motion that the appeal was taken by the American Straw Board Company, and the bond on appeal given to stay the judgment, executed by it as principal.

Upon appellee's own showing, the motion will have to be overruled.

Filed Jan. 17, 1895.

No. 1,041.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. BERRYMAN.

RAILROAD.—*Use of Same Track by Two Companies' Trains.*—*Sale of Tickets.*—*Agency.*—Where the trains of one railroad company, by an arrangement between it and another company, use the track of the latter company between certain points, and regularly stop at intermediate stations to receive and discharge passengers, to whom tickets bearing the names of both companies are sold in the usual way by the local company's ticket agent, the proceeds being divided between the two companies, the local company will be deemed the agent of the other in issuing tickets, and the latter is bound to accept them.

SAME.—*Agent's Authority.*—*Purchase of Ticket Without Notice of Revoca-*

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tion.—Duty of Company to Accept.—Ejection of Passenger.—Where a railroad company runs its trains regularly over a part of the line of another company, customarily stops at intermediate stations to receive and discharge passengers, and accepts tickets sold by the latter company's agent, and by its conduct leads the public to believe that the local company's agents are authorized to sell tickets for use upon its trains, it is bound to accept a ticket from, and is liable for ejecting, a passenger who (with knowledge of the custom and relying upon the local agent's authority, without notice of its withdrawal) purchased the ticket in the ordinary course after the revocation of the agent's authority to sell that kind of a ticket.

SAME.—Ticket Bearing Names of Two Companies.—Presumption.—Where one railroad company, between certain points, uses the track of another company, and, at intermediate stations, tickets bearing the names of both companies are sold to passengers, without limiting words upon the face thereof, it is an indication to passengers who know that the trains of both companies run over the same track, that the ticket is intended for use upon the trains of either company.

SAME.—When Erroneous Instruction Harmless.—Instructions going to the question of the defendant's duty to accept the ticket tendered by the plaintiff, although incorrect, will be deemed harmless, and not available for a reversal of the judgment where the verdict rightfully determines the duty of the defendant in that particular.

SAME.—Damages.—Measure of.—Excessive Damages.—As there is no standard by which the damages sustained by a passenger by reason of a wrongful public expulsion from a train can be accurately measured, the amount fixed by the jury in this case will not be disturbed on appeal.

From the Clinton Circuit Court.

C. H. Burchenal and J. L. Rupe, for appellant.

G. H. Gifford, C. H. Gifford, M. Bristow and J. T. Hackman, for appellee.

GAVIN, J.—The appellee sued to recover damages caused by her wrongful expulsion from appellant's train.

From her complaint, it appears that the Lake Erie and Western Railway Company owned a railroad from Indianapolis through Tipton and Kokomo to Michigan City; appellant owned a road from Kokomo to Logansport; by some arrangement between the roads, the terms of

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which were unknown to appellee, the appellant ran her train over the L. E. & W. road from Kokomo to Indianapolis, with an agreement to carry passengers upon tickets issued by the L. E. & W. Co., the proceeds of which were divided between the two roads. Appellant's train stopped at Tipton and Kokomo regularly to receive and discharge passengers. On the day mentioned in the complaint, appellee purchased from the L. E. & W. agent at Tipton a coupon ticket from Tipton to Kokomo and thence to Logansport.

This ticket was purchased just before the appellant's train was due, and was purchased and sold for use on that train. With it she boarded the train and tendered it to the conductor for her passage, but it was refused, and she was ejected. There were various stipulations and conditions on the ticket, providing that under the contingencies named the ticket should be invalid, *e. g.*, that it should not be good unless stamped, nor if checks were detached, etc.

While the ticket showed it was issued by the L. E. & W. Co., there was nothing to indicate that it was for use only on L. E. & W. trains. The coupon from Tipton to Kokomo read:

L. E. & W. P., C., C. & St. L.
Stealing Improved Coupon Ticket. Pat. May 28, 1876.

"ISSUED BY LAKE ERIE AND WESTERN RAILROAD.

TIPTON TO KOKOMO.

Anderson.	Cincinnati.	Crown Point.	Chicago.	Galveston.	La Crosse.	Logansport.	New Castle.	Royal Center.	Richmond.	Walton.
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On Condition Named in Contract. One Passage.

NOT GOOD IF DETACHED.

801 L. E. & W. P., C., C. & St. L."

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Under the allegations of the complaint and the form of the ticket, the L. E. & W. Co. was in effect made the agent of the appellant for the issuing of tickets good on its trains over the L. E. & W. road. The appellant was under the same obligation to accept the ticket as rested upon the L. E. & W. Co., and under substantially the same obligation to accept as if it had itself issued the ticket.

In *Schopman v. Boston, etc., R. R. Co.*, 9 Cush. 24, a passenger procured a ticket from one company (not the defendant) from Springfield through Worcester to Boston. From Worcester to Boston she rode over the defendant's road in a train hauled by its engine and under its control. The defendant, however, claimed, as here, that there was no contract between it and the passenger. The court says: "It is, in our view, quite immaterial where she may have obtained this Boston and Worcester railroad ticket. If the defendants adopt this mode of furnishing their tickets to sell elsewhere, either at other railroad stations, or in connection with stages, or if they agree with another contiguous railroad company, that a ticket be issued which is to entitle the purchaser to pass on both roads, and which, upon being shown to the conductor of the Boston and Worcester road, is to have all the benefits of ordinary tickets, and to be received by him as such ticket, it is, to all intents and purposes, the same thing to the traveler as a ticket purchased at the office of the Boston and Worcester railroad; and the rights of the passenger and the liabilities of the company are the same as if the ticket had been purchased at the office of the Boston and Worcester railroad company, for the mere passage from Worcester to Boston."

That the appellant was really a party to the contract of carriage under the allegations, see *Foulkes v. Met. Dist. R. W. Co.*, 5 Com. P. Div., L. R., 157 (158).

As to the various provisos and contingencies contained in the ticket, conceding without deciding that the appellee was in all respects bound by them, they were matters of defense to be set up by appellant.

We do not regard as material the failure to give the full name of the appellant in referring to it in the body of the complaint. Appellant is properly named as a defendant in the caption, and the first use of the incorrect name is in connection with the words, the "said defendant." Taking the pleading altogether, it is clear that appellant is the company designated, and we are satisfied it states a good cause of action.

By its first paragraph of answer, appellant set up that its only right to run trains over the L. E. & W. road was by virtue of a contract which provided that the L. E. & W. Co. should retain its local passenger business and appellant should not sell tickets on its trains for points between Indianapolis and Kokomo; that appellant maintained no ticket office nor ticket agent at Tipton; that there was no obligation resting upon it to carry passengers from Tipton to Kokomo on L. E. & W. tickets except at its own option; that appellant had nothing to do with the sale of the ticket in question, and did not in any manner authorize the sale of it or any of like import, but, on the contrary, had notified the L. E. & W. Co., through its general passenger agent, that such tickets would not be honored on appellant's trains; that Tipton is not a station where appellant's trains stopped regularly to receive and discharge passengers generally, but appellants stopped at the L. E. & W. depot at that point because there was a railroad crossing there, on account of which trains were compelled, by law, to stop. Appellant further expressly denied any arrangement with the L. E. & W. Co. to honor such tickets as that issued to appellee, it being a coupon ticket, extending beyond

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Kokomo, but alleged that it was between said roads agreed that such tickets should not be so honored; that the ticket was not sold for passage on appellant's train, but was issued by the L. E. & W. Co., which ran four trains daily between Tipton and Kokomo. A copy of the ticket was set out with the answer, and some further formal allegations were contained in it.

To this answer appellee replied that for five years prior to the occurrence in controversy appellant had, under its contracts, run its trains over the said L. E. & W. road, had used the same depot at Tipton for the accommodation of its patrons, where the same ticket agent sold tickets for the trains of appellant and the L. E. & W. Co.; that during such time appellant ran a solid train between Indianapolis and Logansport, and during said time solicited and received passengers upon its trains at Tipton and conveyed them on a continuous passage to Logansport; that as an inducement to those taking passage on appellant's trains, to purchase tickets reading from Tipton to Logansport, said tickets being of the kind and character mentioned in the complaint and answer, appellant charged on the train an amount in excess of the ticket rate; that the only tickets sold for appellant's passenger trains at said ticket office at Tipton during said time, reading from Tipton to Logansport, were of the kind and character mentioned in the complaint, and during all of said time this defendant adopted said tickets as its own and honored and received said tickets for passage upon its trains between said points; that if appellant had the option alleged in its answer it had for several years prior to the sale of said ticket to appellee, elected to exercise said option by soliciting passengers and receiving and honoring such tickets upon its trains, and invited the appellee and the traveling public to purchase said tickets; that on divers occasions prior to this

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one, appellee had purchased from said ticket agent at Tipton tickets like the one mentioned in the complaint, and at all of said times appellant had received and honored the same for continuous passage from Tipton to Logansport; that appellee purchased her said ticket on the occasion complained of from said appellant's agent for use on said appellant's train, as said agent then knew, without any knowledge or notice, that the same would not be honored.

To this reply a demurrer was overruled, with an exception. In this ruling there was no error. The averments of the reply show that for several years the L. E. & W. Co. was authorized to issue tickets like the one in question for use on appellant's road and that appellant was bound to accept and honor them, because whenever it authorized the issuance of such tickets for use on its road, it then became bound to honor them. *Wheeler Law of Mod. Carriers*, 286.

If, by its course of business for a series of years, appellant led the public to believe that the L. E. & W. Co. at Tipton was authorized by it to sell tickets of this character, to be used on its trains, and appellee, with knowledge of such custom and in reliance upon such agent's authority, purchased this ticket, without notice of appellant's withdrawal of its authority, the appellant would be bound by the agent's act, even after the revocation of the authority. As to those dealing with the agent, in ignorance of the changed condition of affairs, the appellant is estopped to deny the agent's authority. *Ulrich v. McCormick*, 66 Ind. 243; *North Chicago, etc., Co. v. Hyland*, 94 Ind. 448; *Sweetser v. Odd Fellows', etc., Assn.*, 117 Ind. 97; *Story Agency*, section 470, and notes; *Baltimore, etc., R. R. Co. v. McWhinney*, 36 Ind. 436.

The answer and reply taken together show that appel-

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lant had the right, under the contract, to carry appellee, and it would be manifestly unfair to permit appellant to invite appellee to enter its train to ride on such a ticket, and then eject her for doing just what it had solicited and invited her to do. These roads could not make a contract between themselves that such tickets should not be honored, and then invite and solicit the public to buy them, and after selling them for such purpose, say to the public they were not good. The plainest principles of fair dealing require that travelers should be advised of any such a change in the rights of the parties.

Whether a general notice, properly published, would be sufficient to excuse the want of personal notice, we need not determine, for no notice to the public is shown to have been given. *Kansas, etc., R. W. Co. v. Kessler*, 18 Kan. 523; *Lane v. East Tenn., etc., R. R. Co.*, 5 Lea (Tenn.), 124; *Wheeler Mod. Law of Carriers*, 180.

The reply is not a departure from the complaint. It simply shows that appellant is estopped to assert certain facts set forth in its answer, even if they be true.

These pleadings, with general denials to all the affirmative pleadings, formed the issues which were tried by a jury, which rendered a verdict in favor of appellee.

Appellant's motion for new trial was overruled with an exception.

An examination of the evidence discloses the following state of facts:

The L. E. & W. R. R. Co. owned the road. By contract in 1888 it leased to appellant's predecessor, to whose rights appellant succeeded, the right to use jointly with said L. E. & W. Co. the railroad from Indianapolis to Kokomo, including sidings, switches, stations, etc., for the purpose of running through trains thereon. The contract provides: "All business originating upon the line between Indianapolis and Kokomo, including busi-

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ness from either of said points to the other, shall belong exclusively to the first party (The L. E. & W. Co.), but the second party shall have the right to honor upon its trains the passenger tickets of first party, between points at which trains of second party may be obliged to stop on account of railroad crossings, train orders, etc." Provision is made for monthly settlements as to such tickets, and also as to cash fares received and for a division of the proceeds of such tickets and cash fares between the two companies.

Up to September 22, 1891, appellant received and honored local tickets issued by the L. E. & W. Co., including tickets similar to the one sold appellee. About September, 1891, correspondence between the companies was opened concerning the kind of tickets which the appellant would honor, some dispute having arisen in auditing the accounts.

This correspondence culminated in the issuance of an order by appellants to its ticket receivers as follows:

"PITTSBURG, PA., September 16, 1891.—Please instruct conductors that on and after September 22, 1891, only local tickets issued by the L. E. & W. Ry. reading between Indianapolis and Kokomo and intermediate points, and between Kokomo and Indianapolis and intermediate points, will be accepted on trains of the P., C., C. & St. L. Ry. Co. running between Logansport and Indianapolis.

"In other words, tickets or coupons reading over the L. E. & W. Ry. from Indianapolis to points east or west of Tipton and north of Kokomo and *vice versa*, will be good on L. E. & W. trains only."

A copy of this order was furnished to the general passenger agent of the L. E. & W. Co. and its receipt acknowledged by him. The position of the L. E. & W. Co. with regard to this order was entirely passive, recog-

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nizing that, so far as it was concerned, the appellant had the right under the original contract to say what tickets it would honor.

During all this time the L. E. & W. Co. was running its regular trains over its road. The ticket agent at Tipton was employed, paid and controlled exclusively by the L. E. & W. Co.

Appellant never had any ticket agent at Tipton, and never put any tickets on sale there, except in so far as tickets sold by the L. E. & W. Co. may be held to be its tickets.

At the Tipton depot was a railroad crossing and appellants stopped at the depot regularly, not only on account of the crossing, but to receive and discharge passengers. The L. E. & W. ticket agent opened his windows regularly for the sale of tickets before the arrival of the appellant's trains, and sold coupon tickets for Logansport and other points on the appellant's road, similar to that under consideration, to be used on appellant's trains or on L. E. & W. trains, and they were used on both up to September 22. Such tickets were the only tickets on sale for Logansport *via* Kokomo. Tickets issued by the L. E. & W. Co. for Indianapolis and Kokomo, or intermediate points, without coupons, were honored by the appellants regularly and continuously up to and after the sale of appellee's ticket. The general passenger agent of the L. E. & W. Co. evidently did not understand the order to apply to tickets of this character, and no directions were given by him to discontinue their sale for appellant's trains and no notice given that they would not be honored thereon. The L. E. & W. ticket agent testified that he opened the office window for the sale of tickets fifteen or twenty minutes before the appellant's north-bound train was due, which was about 12:50 P. M.; that this was the first train due; that the next north-

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bound train was an L. E. & W. train due about 3 o'clock; that he was selling tickets for appellant's train; that no train was specified in the sale of appellee's ticket; appellant's train ran direct to Kokomo and Logansport; the first L. E. & W. train, the one due at 3 o'clock, did not make connection at Kokomo for Logansport, the passengers on that train being compelled to wait. He further testified that he found this coupon form of ticket in the office when he took charge, thirteen months before, and continued to sell them up to the time he sold the two to Berryman for both L. E. & W. and appellant's trains.

Appellee's husband testified that shortly before the appellant's north bound train was due he asked the agent for two tickets for Logansport for the Panhandle (appellant's) train, and received the tickets in question, and paid for them; that when the train came in, his wife got on, and as it started he got on and sat down beside her. The conductor came along, he presented the tickets, the conductor refused to receive them as being contrary to his orders, and on his refusal to pay fare put himself and wife off at the next station, whence they walked back home; that prior to October 8, 1891, the day of this transaction, he had himself bought tickets for Logansport similar to these for use on the Panhandle trains, which were honored on such trains, and had also known of others doing likewise, but had never known of their being dishonored until on this occasion. Appellee's husband who bought her ticket testified that at the time of such purchase he had no knowledge that it would not be honored.

One of appellant's servants testified that he notified the husband before he boarded the train, that the ticket was not good. This he denied.

Settlements between the companies were had from time to time, and appellant received its share, twenty-

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five per cent. of the proceeds of tickets issued by the L. E. & W. Co., and taken up by its conductors."

Most of the facts, as we have given them, are conceded by counsel. Those which are not conceded are, in our opinion, established clearly and beyond dispute.

We are unable to construe the ticket, as claimed by appellant, to show upon its face that it was intended for use only on L. E. & W. trains. The absence of any limitation of that character, and the presence of appellant's initials on the Kokomo coupon, the heading of which is "L. E. & W., P. C. C. & St. L.," and the ending the same, "L. E. & W., P. C. C. & St. L.," would indicate strongly, to a purchaser who knew that both L. E. & W. and P. C. C. & St. L. trains were run over this road, that the ticket was intended to be used on either company's trains. *Peterson v. Chicago, etc., R. W. Co.*, 45 N. W. Rep. 573.

From the circumstances and evidence recited, the conclusion inevitably follows that appellee's ticket was purchased and sold for use on appellant's train. It likewise follows that up to September 22, 1891, the L. E. & W. Co., and its agent at Tipton, were authorized to issue and sell tickets, such as appellee's, for use on appellant's train. It may also be conceded that the order of September 16, applies to and forbids the receiving of tickets such as appellee's, thus revoking such authority, and leaving the L. E. & W. Co., on October 8, without any actual authority to sell such tickets for such use, although it was on that day authorized to sell certain kinds of tickets for use thereon.

It should be remembered in this connection that when an agent has been invested with certain powers and persons deal with him in reliance upon such authority, they are not bound by secret instructions given to the agent

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and not known to the third persons. *Lake Shore, etc., R. W. Co. v. Foster*, 104 Ind. 293.

It is true there is not, in the evidence, any direct appointment of the L. E. & W. Co., as the agent of the appellant, *eo nomine*, for any purpose, yet the existence of the agency is abundantly proved by the acts and conduct and course of dealing of the parties from which it may be implied.

No express appointment of an agent is necessary to create that relation, at least so far as the rights of third persons are concerned. Although the officers persistently say there was no agency, yet the facts admitted are such as in legal contemplation constitute an agency, so far as third parties are concerned at least. Mechem Agency, sections 83, 84; Story Agency, section 54. *Pursley v. Morrison*, 7 Ind. 356, 1 Am. & Eng. Encyc. of Law, 340.

To recapitulate the result of the facts, it appears that the L. E. & W. Co. was, for several years and up to October 8, 1891, authorized to sell tickets for use on appellant's road. On September 22, 1891, this right was revoked as to tickets such as that purchased by appellee, but permitted to continue as to other kinds of tickets, but no public notice of such revocation was given. On October 8, 1891, appellee, having had knowledge of the previous agency and relying upon it, without knowledge of the revocation, purchased the ticket on which she sought to ride, and which was refused by appellant, and she herself required to leave the train.

Under such facts there could be, upon the principles of law which we have announced, but one proper result of the trial and that must be a verdict for appellee.

When appellee boarded the train, with a ticket which entitled her to ride thereon, and tendered it to the appellant, it was bound to carry her, and it was wrongful to

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require her to leave the train. *Corsten v. Northern Pac. R. R. Co.*, 44 Minn. 454; *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381.

We have thus presented the facts in detail, and the law as we adjudge it to be, and it is therefore unnecessary to take up, *seriatim*, the errors urged in the admission of evidence and as to instructions. The views of the law expressed, dispose of most of them against the claims of appellant.

The third and seventh charges given we must regard as incorrect, but this does not necessarily require nor justify a reversal. These instructions went to the question of appellant's duty to receive appellee's ticket. Since the verdict was unquestionably right in determining that such was the duty of appellant, there was no harmful error in the instructions. *Elliott App. Proced.*, sections 642, 643; *City of Lafayette v. Ashby*, 8 Ind. App. 214.

While the damages appear to us larger than should have been allowed by the jury or approved by the trial judge, when regarded as compensatory only, we do not feel free, under the rule established by many cases, to disturb the verdict on that ground.

The action is one sounding in tort, and the humiliation and mortification caused appellee, by reason of being publicly compelled to leave the train, are proper elements of damage. *Louisville, etc., R. W. Co. v. Wolfe*, 128 Ind. 347; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Chicago, etc., R. R. Co. v. Holdbridge*, 118 Ind. 281; *Indianapolis, etc., R. W. Co. v. Howerton*, 127 Ind. 236; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Lake Erie, etc., R. R. Co. v. Arnold*, 8 Ind. App. 297.

There is no standard by which such damages can be accurately estimated or measured. The authority of the above cases, with many others of like import, compels us to refrain from reducing the amount of this verdict.

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In the action of the court in instructing the jury to find for the defendant, the L. E. & W. Co., there was no error of which the appellant can complain.

There was no issue joined between these two defendants. If they have any rights, the one against the other, that is for them to settle.

We have not found, either in the pleadings or in the ruling on the motion for new trial, any error which would justify a reversal.

Judgment affirmed.

Filed Feb. 24, 1894; petition for a rehearing overruled Nov. 23, 1894.

No. 1,248.

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NEGLIGENCE.—*Child Non Sui Juris, Negligence of Parent.*—*Negating Imputed Negligence.*—In an action by a child *non sui juris* for injury occasioned by the negligence of the defendant, the negligence of its custodian is imputed to the child, and therefore the general averment that the injured child was without fault is sufficient to negative the imputed negligence of the parent or custodian. On the trial it must be shown that the custodian was without fault.

SAME.—*Child Non Sui Juris a Question for Jury.*—In such an action, whether the plaintiff was *sui juris* or *non sui juris*, is a question of capacity for the jury.

SAME.—*When Child May Maintain an Action for a Negligent Injury.*—If a child is of such tender years as to be wholly irresponsible, in an action by the child, there should be imputed to it, without limit or qualification, the conduct of the parent or person standing *in loco parentis*, but such is not the rule if the child has capacity to exercise discretion in its own behalf.

SAME.—*Special Verdict.*—*Injury to Child.*—*Finding as to Contributory Negligence, When Jury May Determine.*—The finding in a special verdict that the child had sufficient capacity to exercise reasonable care, and that he was in the exercise of ordinary care, can stand

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only as ultimate facts, drawn as inferences from given specific facts on which they are predicated. If the jury find the facts specially in relation to the age, experience, capacity, and conduct of the child when injured, and it is indisputable that only one inference can be drawn from the facts, and that is the conclusion that the child was guilty of negligence contributing, as a proximate cause, to its injury, then the finding that the child was not guilty of contributory negligence should be disregarded, but if there is room for a difference of opinion between reasonable men as to the inferences which may fairly be drawn from such facts, then it is proper for the jury to determine the question of contributory negligence.

SAME.—Degree of Care Required of a Child Sui Juris.—In an action by a child who is *sui juris*, for damages for personal injuries sustained by it on account of culpable negligence on the part of the defendant, the latter can not escape liability solely on the ground that the child is chargeable with contributory negligence because it did not exercise the ordinary care that a reasonably prudent adult person should have exercised under similar circumstances. If the child exercise ordinary care as a reasonably prudent child of the same age, experience, and capacity should have exercised under similar circumstances, it is not guilty of contributory negligence.

SAME.—Degree of Care Required of a Child Non Sui Juris.—In an action for negligence by a child *non sui juris*, if it in fact exercised the ordinary care that a reasonably prudent adult person should have exercised under similar circumstances, the negligence of its parents can not be imputed to it to defeat a recovery.

SAME.—Child Playing in Street.—A child is not guilty of contributory negligence *per se* by playing in a public street.

From the Carroll Circuit Court.

G. W. Kretzinger, E. C. Field, J. F. McHugh, R. C. Pollard and C. R. Pollard, for appellant.

H. H. Vinton, D. P. Vinton, J. H. Gould, G. R. Eldridge and J. M. LaRue, for appellee.

DAVIS, J.—A judgment on a special verdict returned by the jury was rendered for \$3,500 against the appellant.

This appeal is prosecuted for an alleged error of the trial court in overruling appellant's motion for judgment in its favor on the special verdict. Cross-errors

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have been assigned by appellee, bringing in review the action of the trial court in overruling appellee's motion for a *venire de novo*, and also for a new trial.

The verdict is set out in full as follows:

"We, the jury, find the following special verdict in the above entitled cause:

"We find that the defendant, the Louisville, New Albany and Chicago Railway Company, is, and prior to the 12th day of April, 1891, and at that time was, a corporation duly organized under the laws of the State of Indiana, and, as such was, operating a line of railroad from Louisville, in the State of Kentucky, to Chicago, in the State of Illinois; that said line of road is located and runs through the corporate limits of the city of Lafayette, in Tippecanoe county, in the State of Indiana, and along on Fifth street, in said city, occupying a track located about the center of said street, the ties of which are eight feet long; the distance between the rails on the inside was four feet, eight inches and a half; that the box and platform cars used at that time on freight trains on said railroad were from eight feet four inches to eight feet eight inches wide; that said street was sixty feet wide from the property line on one side to the property line on the other, and was forty feet wide between the sidewalks; that said street and sidewalks were in constant use by the inhabitants of said city and the public generally; that said Fifth street was an improved street and in good condition in all parts of it, except the dirt piles and holes hereinafter mentioned, on the 12th day of April, 1891, and was at that time in a populous and thickly-settled portion of the city of Lafayette, and in the corporate limits thereof; that on the 12th day of April, 1891, and for years prior thereto, and ever since, there has been in force in said city of Lafayette a valid ordinance of said city limiting the rate of speed of all

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railroad trains to six miles per hour; that some five days prior to the 12th day of April, 1891, said defendant company, for the purpose of removing old ties from its road-bed in said Fifth street, and replacing them with new ones at a point on said road about 150 feet north of Romig street in said city, and extending north about thirty feet, put some of the dirt on the east side and outside of the track of said company's road in a continuous pile about thirty feet long, the base of which, next to the track, was about one foot outside of the ends of the ties and outside of that part of the street used by the railroad, and in the part of the street used by the public, which pile extended north and south along said track, and was twenty inches high, and holes were left where said dirt had been taken out at the sides and ends of the ties and so remained for five days and until after the plaintiff was injured as hereinafter shown; that the new ties were put in and the dirt left in said piles prior to the 12th day of April, 1891, as aforesaid, and that said dirt might have reasonably been put back and the holes filled, and any obstruction to the street thereby removed from time to time as the new ties were put in; that George Sears, the plaintiff in this suit, was born on the 22d day of April, 1883, and at the time of the injury to him, hereinafter set forth, was seven years, ten months and twenty days old, and resided with his parents at the southeast corner of Romig and Fifth streets, in said city of Lafayette; that he was a boy of ordinary intelligence for his age, and prior to the time of said injury had been accustomed to go on the streets of the city of Lafayette unattended, going to and from school, going on errands and playing upon the streets, particularly Romig and Fifth streets near his father's residence; that on Sunday, April 12, 1891, at about 7:30 A. M., said George Sears, with three

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other boys near his age, was playing at a game called by them 'stink-base,' two of the boys having their base on the north side and two on the south side of Romig street, which street crosses Fifth street, running east and west, and said Fifth street runs north and south through said city; that on said 12th day of April, 1891, at about 7:30 o'clock in the forenoon, a freight train on said defendant's said road, owned and operated by the defendant, running from three or four squares south of Romig street in said city of Lafayette to said Romig street, crossed the same on said Fifth street, and ran along said Fifth street, going north in the corporate limits of said city, and past said pile of dirt situated on Fifth street as above found, said train then running at a rate of speed exceeding six miles per hour, to wit, at the rate of eight miles per hour; that the train consisted of a locomotive and twenty-five box cars; that while said train was passing Romig street, and after two or three cars had passed, the plaintiff started to run, and did run north on said Fifth street, and in the same direction in which the cars were running, and one of the other boys ran after him for a short distance and stopped; that said plaintiff continued running, believing that one of the boys was running after him, and while so running, stepped on said pile of dirt at a place where it was twenty inches high, and the dirt gave way, causing said plaintiff to slip and fall, and slide down said pile of dirt toward and under said moving train, which was then running opposite the place where said boy fell, and some of the cars, including the caboose at the south end thereof, ran over said plaintiff, and both his legs were so mangled and crushed by said train that it was necessary to amputate both legs at four inches below the knees, which was on said day accordingly done, the operation being performed by Dr. George F. Beasley, the defendant company's surgeon, assisted by

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Dr. Potel, both reputable and competent physicians and surgeons; that by reason of said injury and wounds, the plaintiff has suffered great bodily and mental pain, and continues to suffer pain, and is maimed and crippled for life; that said plaintiff, at the time of his injury, was of sufficient age and capacity to exercise reasonable care in his own behalf, and that his parents were not without fault in permitting him to go abroad on the streets of said city unattended; that while said pile of dirt upon which plaintiff so stepped, and which gave way with him as stated, was apparent, and was an obstruction on said street, and in fact dangerous by reason of its liability to cause persons to stumble over the same, or of giving way, and thereby throwing persons down, still such danger was not so apparent as that it would be reasonably foreseen by a boy of the age, experience, and capacity of the plaintiff under the circumstances in which he was placed at the time he so stepped on said pile, and said danger was not in fact then and there apparent to plaintiff, and the plaintiff, in so running along said street, and stepping on said pile of dirt, which so gave way with him, and caused him to fall and slide under said moving train, was in the exercise of ordinary care considering his age, intelligence and the other facts herein found.

"We further find that the length of time said defendant allowed said street to remain obstructed by said pile of dirt, and said holes as herein found, was an unreasonable length of time.

"If upon the foregoing facts the court is of the opinion that the law is with the plaintiff, then we find for the plaintiff, and assess his damages at \$3,500.

"If, however, the court is of the opinion that the law is with the defendant, then we find for the defendant."

It is earnestly contended by counsel for appellant that

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the verdict of the jury is not sufficient to sustain the judgment in behalf of appellee, because there is no finding of facts therein showing that his injuries were sustained without any fault on the part of his parents contributing thereto. It is necessary to consider, in this connection, the question whether the appellee, under the facts and circumstances disclosed by the verdict, was *sui juris* or *non sui juris*. In other words, whether the doctrine of imputed negligence has any application in this case.

If the appellee was *non sui juris*, the negligence of his custodian is to be imputed to the child, and, therefore, the general averment in such cases that the injured child was without fault is sufficient to negative the imputed negligence of the parent or custodian. *Terre Haute Street R. W. Co. v. Tappenbeck*, 9 Ind. App. 422.

It is necessary, however, in such cases—when the child lacks capacity to exercise care for himself—to establish on the trial that the parent was without fault.

If, therefore, it was essential to a recovery in behalf of appellee that the verdict should contain a finding of facts showing that his parents were in the exercise of due and ordinary care on this occasion, it might be a serious question whether the verdict could stand, because the particular facts in relation to the acts or knowledge of the parents concerning the situation of the child and the care exercised by them, are not specifically found. It does not clearly appear, for instance, whether they knew, prior to the injury, of the alleged negligence of appellant in leaving the dirt in the street, or whether appellee was, on this occasion, playing in the street in the vicinity of the pile of dirt with their knowledge or consent, or what instructions, if any, they had given him with reference to the care he should exercise when in the street.

It is true there is a finding "that his parents were not

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without fault in permitting him to go abroad in the streets of said city unattended," but this is simply a conclusion, and not a fact. In any event the finding only imputes negligence to the parents respecting his being in the streets unattended, and is silent respecting the particular occasion in question. If all the facts and circumstances relative to their knowledge and acts were found in the verdict in connection with the age and capacity of appellee, and the other facts and circumstances set out in the verdict, then if there was room for difference of opinion between reasonable men as to the inferences that might be fairly drawn therefrom, the question as to whether the parents exercised ordinary care under the circumstances would be one for the jury. *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39; *Kentucky and Indiana Bridge Co. v. McKinney*, 9 Ind. App. 213.

All infants are not held, as a matter of law, to be *non sui juris*. It has been held in several cases in this State, that children ranging in ages from two years to seven years and two months are *non sui juris*. *Citizens' St. R. R. Co., etc., v. Stoddard*, 10 Ind. App. 278, and authorities there cited.

In no case, so far as our attention has been called thereto, in this State, has the court held that a child, in excess of seven years and two months old, was, as a matter of law, *non sui juris*.

In *Terre Haute Street R. W. Co. v. Tappenbeck*, *supra*, we said: "A great many cases support the proposition that a boy nine years of age, where it does not appear that he was in any respect deficient or incompetent is *sui juris*, and is bound to exercise the degree of care which can reasonably be expected of one of his age." In this case appellee was, when he was injured, seven years, ten months and twenty days old. Whether appellee was *sui juris* or *non sui juris* was a question of ca-

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capacity for the jury. *Terre Haute Street R. W. Co. v. Tappenbeck, supra*; *Citizens' St. R. R. Co. v. Stoddard, supra*.

The jury found that appellee resided at the southeast corner of Romig and Fifth streets, near where the accident occurred; that he was accustomed to go on the streets unattended to and from school, going errands, and playing upon the streets near his father's residence, including the street on which said railroad was located; that he was a boy of ordinary intelligence for his age; that he was of sufficient age and capacity to exercise reasonable care in his own behalf.

In *Terre Haute, etc., R. W. Co. v. Tappenbeck, supra*, we said: "Whether the rule referred to, imputing the negligence of the parent to the child, in actions prosecuted for and in behalf of the child, is a just or unjust rule, and whether it is supported or condemned by the weight of authority, we are not required in this action to determine." See *Chicago City R. Co. v. Wilcox*, 50 Am. and Eng. R. Cas. 464.

In this state the rule has only been applied, so far as we are advised, in two cases, where the action was prosecuted by the child. In one case the child was under the age of five years. *Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287.

And in the other case the child was a little over five years of age. *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25.

The better rule, in the opinion of the writer, is when the action is brought by the infant, whether *sui juris* or *non sui juris*, for his own benefit, that the negligence of the parent or custodian of the child shall not be imputed to the child. *Westbrook v. Mobile and Ohio R. R. Co.*, 14 Am. St. Rep. 587, and notes.

In a recent case, which was prosecuted by a boy eleven years of age, to recover damages which he sustained on

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account of the negligence of a railroad company, Chief Justice HOWARD said: "The appellee in this case is suing for his own injury. He was himself capable of going to school across the railroad, and his parents are not in the case, nor is it necessary that they should be." *Cleveland, etc., R. W. Co. v. Keely*, 138 Ind. 600.

The rule in such cases (in the light of the decisions of our Supreme Court, conceding without deciding that they go to the extent indicated) in our opinion is that where a child is of such tender years as to be wholly irresponsible, it should in this class of actions have imputed to it, without limit or qualification, the conduct of the parent or other person standing *in loco parentis*, but this is not, in our judgment, the rule of reason or law in case of a child who has capacity to exercise discretion in its own behalf. *Louisville, etc., R. W. Co. v. Hirsch*, 69 Miss. 126, s. c. 56 Am. & Eng. R. Cas. 291.

If we are correct in this conclusion, it was not essential to appellee's recovery that it should affirmatively appear, in the special verdict, that his parents were in all respects in the exercise of due care on this occasion.

It is next insisted that the verdict fails to find facts showing that appellee was without fault. On the contrary, it is contended that the facts in the verdict show that he was guilty of contributory negligence.

Appellant's counsel urge that certain parts of the verdict, in substance, and to the effect that appellee had sufficient capacity to exercise reasonable care, and that he was in the exercise of ordinary care should be eliminated. These findings can only stand as ultimate facts, drawn as inferences from the given specific facts on which they are predicated. The correct rule in this state is clearly stated by Judge COFFEY in *Cincinnati, etc., R. W. Co. v. Grames*, *supra*. In this case the jury find the facts specially in relation to the age, experience, ca-

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capacity and conduct of appellee on this occasion. If it was indisputable that only one inference could be drawn from the facts, and that was the conclusion that appellee was guilty of negligence contributing, as a proximate cause, to his injury, then the contrary inferences drawn by the jury should be disregarded; but if there was or is room for difference of opinion between reasonable men as to the inferences which might fairly be drawn from such facts, then it was proper for the jury to determine the question of contributory negligence.

If the question of contributory negligence on the part of appellee had been submitted to us, under the circumstances disclosed, we might have reached a different conclusion, but as there is, in our opinion, room for difference of opinion between reasonable men as to the inferences which might be fairly drawn from the facts and circumstances set out in the verdict, the question as to whether appellee exercised ordinary care (such care and caution as are usually looked for in other children of like age and capacity with the appellee), was, under the authorities, we think, a question for the jury's determination. Section 136, Beach Contrib. Neg.; Thompson Neg., vol. 2, 1180; *Louisville, etc., R. R. Co. v. Hirsh, supra*.

In *Rauch v. Lloyd*, 31 Pa. St. 358, the action was by an infant six or seven years of age. The court said: "That every case is to be determined by its own circumstances, and that children are to be held responsible only for the discretion of children, seem a self-evident proposition. * * * If he had gone out of his track to place himself under the cars, it might be accounted rashness even in a child; but, pursuing his highway, he may well have supposed that the men who placed the cars there expected him to pass under them. Considering his age, and all the circumstances of the

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case, we see nothing that would justify the imputation of negligence or imprudence. He acted like a child, and he is not to be judged as a man. * * * He was in the exercise of a right, in a manner not unreasonable or imprudent for a child, and they injured him by reason of having stopped where they had no right to stop."

In *Byrne v. New York Central, etc., R. R. Co.*, 83 N. Y. 620, which was an action brought by a minor between ten and eleven years old for injuries received at a railroad crossing, the court said: "The law is not so unreasonable as to exact from an infant the same degree of care and prudence in the presence of danger as it exacts from adults. An infant, to avoid the imputation of negligence, is bound only to exercise the degree of care which can reasonably be expected of one of its age. * * We can not within these authorities, upon the undisputed facts, say, as a matter of law, that the plaintiff—regard being had to her tender years—failed in that degree of care which the law required of her. Whether she did or not was, upon all the circumstances of this case, a question for the jury."

Dowling v. New York Central, etc., R. R. Co., 90 N. Y. 670, was an action brought by a girl about nine years old to recover damages sustained by her on account of injuries from an engine of the company at a street crossing. The court said: "It is not disputed that there was sufficient evidence of the defendant's negligence, but the claim is here made that there was undisputed and uncontradicted evidence of the plaintiff's contributory negligence. We are of the opinion that, under all the circumstances, it was a question of fact for the jury to determine whether there was negligence upon the part of the plaintiff. * * * But it is well settled that the same degree of care is not required of an infant of tender years which is required of an adult. An infant, to avoid the imputation of negligence, is bound only to exercise the degree of care which can reasonably be expected of one of its age. * * We can not within these authorities, upon the undisputed facts, say, as a matter of law, that the plaintiff—regard being had to her tender years—failed in that degree of care which the law required of her. Whether she did or not was, upon all the circumstances of this case, a question for the jury."

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tation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age, and in passing upon the question of contributory negligence the age of the infant, with all the other circumstances in the case, is to be considered by the jury."

. In *Stone v. Dry Dock, etc., R. R. Co.*, 115 N. Y. 104, a nonsuit was granted on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part which contributed to her death, and barred a recovery by the administrator. The court said: "We think the case should have been submitted to the jury. * * * It can not be asserted as a proposition of law that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. * * * From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical condition, training, habits of life and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the court can safely decide the fact. * * The negligence of the defendant's driver is conceded, and it was for the jury to judge whether the conduct of the child in crossing the street to join another child engaged in roller skating on the opposite side was characterized by any want of that degree of care which children, under similar circumstances, would usually exercise."

In *Railroad Co. v. Stout*, 17 Wall., 657, the court said: "The care and caution required of a child is according to his maturity and capacity only, and this is to

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be determined in each case by the circumstances of the case."

In *Baker v. Flint, etc., R. R. Co.*, 68 Mich. 90, a boy seven years and three months old sued to recover damages for personal injuries received by him from being run over by the defendant's train of cars. The court said: "There is no question but that it was this boy's right to cross the railroad track at any time when he would not be injured by teams, wagons, cars, or other things going upon or across the street; and this right is accompanied with the duty to use reasonable and at least ordinary care on the part of the child,—his age, experience and intelligence being taken into consideration with other circumstances existing at the time the accident occurred." See, also, *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179.

In actions for injuries sustained by a child, the question as to the negligence of the defendant, ordinarily, stands on the same footing as in case of an adult person, except when a child is seen by the defendant in time to avoid the injury, or when the liability of children to exposure is known by the defendant prior to the injury, then a higher degree of care is exacted of the defendant, under some circumstances, to avoid the injury. *City of Indianapolis v. Emmelman*, 108 Ind. 530.

But in an action by a child who is *sui juris*, for damages for personal injuries sustained by it on account of culpable negligence on the part of the defendant, the defendant can not escape liability solely on the ground that the child is chargeable with contributory negligence because it did not exercise the ordinary care that a reasonably prudent adult person should have exercised under similar circumstances. If a child who is *sui juris* exercises such ordinary care as a reasonably prudent child of the same age, experience, and capacity should have ex-

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exercised under similar circumstances, the child is not guilty of contributory negligence.

In an action by a child that is *non sui juris*, if the child in fact exercises the ordinary care that a reasonably prudent adult person should have exercised under similar circumstances, the negligence of the parents can not be imputed to it to defeat a recovery.

In *Ihl v. Forty-Second Street, etc., R. R. Co.*, 47 N. Y. 317 (7 Am. Rep. 450), the court says: "If the child exercised proper care, and the injury was caused wholly by the negligence of the driver, the defendant was clearly liable without regard to the question whether it was negligent in the parents to let the child go out as it did. * * * The child was only three years and two months old and clearly within the adjudged cases in which infants have been held not *sui juris* or responsible for their own conduct, but only through their custodians; and this incapacity was obvious, and apparent to the driver. All the cases in which the negligence of parents or custodians of infants not *sui juris* is held to preclude a recovery by such infants or their representatives, necessarily assume that the conduct of the infant was such as would, in case of a person *sui juris*, have amounted to contributory negligence, and hold that the negligence of the parent or custodian, but not the personal conduct of the infant constitutes the bar."

In another case the court said: "It is in cases where the child has done, or omitted something which would be regarded in an adult as negligent, that the conduct of the parents in respect to the degree of care exercised over the child becomes material and the reason is that the negligence can not be imputed to the child, except through the parents; but when the child has done no negligent act, the conduct of the parents may be regarded

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as too remote." *McGarry v. Loomis*, 63 N. Y. 104 (20 Am. Rep. 510).

If the question can be regarded as an open one in this State, under the decisions of the Supreme Court cited *supra*, and the decision was necessary to the determination of this case, the writer would insist that in an action by a child that is *non sui juris*, the child can not be charged with contributory negligence and barred from a recovery for an injury inflicted upon him through the negligence of another, because the child did not exercise reasonable care to avoid the injury.

If an action is brought by the father for the negligent injury of his child, contributory negligence on the part of the father will bar the action, and in such action the father can only recover under the same circumstance of prudence on the part of the child as would be required if the action was in behalf of the child. Sections 131 and 132, *Beach Contrib. Neg.*

In this case the action is brought for the benefit of the child. There is no question here as to going on the track of a railroad crossing, catching at a ladder to steal a ride, or in any manner interfering with either the track or train. He was playing in and along the street near his home—not on the track—and was injured by stepping on a pile of dirt, which appellant had negligently left in the street outside of the ends of the ties, for five days, which gave away, causing him to slip and fall and slide down said pile of dirt, towards and under the moving train.

We are inclined to agree with counsel for appellant that the rate of speed in excess of six miles an hour did not contribute to, and was not a proximate cause of, appellee's injury. *Western Railway of Alabama v. Mutch*, 54 Am. & Eng. R. R. Cas., 107 (Supreme Court of Alabama).

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It is next insisted that appellee could not recover for injuries sustained by him through negligence of the company while using the street as a play ground.

In our opinion the appellee was lawfully in the street. "Nor does it matter that he was at play with other children." *McGuire v. Spence*, 91 N. Y. 303; *Huerzeller v. Central Cross, etc.*, 139 N. Y. 490; *City of Indianapolis v. Emmelman, supra*; *Citizens' St. R. R. Co. v. Stoddard, supra*.

He was not in any sense a trespasser. He had the right,—exercising ordinary care,—to play in the street, in the manner and under the circumstances as found by the jury.

If the rule of imputable negligence was applicable in this case, it is difficult to see on what theory the court could say that it was negligence *per se* on the part of the parents to allow a child of ordinary intelligence to go abroad on the streets unattended.

Playing in and along the street was not, in our opinion, negligence *per se* on the part of either appellee or his parents.

It is apparent, we think, from the facts and circumstances disclosed in the verdict, that if there was any negligence on the part of the child contributing to his injury, such negligence does not necessarily grow out of the fact that he was playing in the street, either with or without the knowledge or consent of his parents, but it arises out of his act in running upon a pile of dirt twenty inches high and thirty feet long in the street in the immediate proximity of a moving freight train. That part of the street, at the intersection of Romig and Fifth streets in which appellee was playing at and prior to the arrival of the train, was not, so far as disclosed by the finding, in any respect dangerous, except such danger as was incident to the running of trains on and along

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the railroad. The dirt was one hundred and fifty feet north of this point. There does not appear to have been any danger in running in and along the street by the side of and with the moving train, except such danger as was created by the pile of dirt aforesaid. The fact that the pile of dirt was in the street adjacent to the railroad track was evidently apparent to appellee, but the jury expressly find that the danger of it giving away was not so apparent as to be reasonably foreseen, under the circumstances, by appellee, who, they find, was a boy of sufficient age and capacity to exercise reasonable care in his own behalf, and they find that he was in the exercise of ordinary care on this occasion.

In addition to the authorities hereinbefore cited on the question of contributory negligence, see, also, the following: *Citizens' Street R. R. Co. v. Spahr*, 7 Ind. App. 23; *Louisville, etc., R. W. Co. v. Davis*, 7 Ind. App. 222; *Evansville, etc., R. R. Co. v. Athon*, 6 Ind. App. 295; *Louisville, etc., R. W. Co. v. Costello*, 9 Ind. App. 462; *Pittsburgh, etc., R. W. Co. v. Klitch*, 11 Ind. App. 290; *Chicago, etc., R. R. Co. v. Butler*, 10 Ind. App. 244; section 136, Beach Contrib. Neg.

Judgment affirmed.

Filed Nov. 14, 1894; petition for a rehearing overruled Feb. 7, 1895.

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No. 1,328.

PHILLIPS v. MICHAELS, GUARDIAN.

MASTER AND SERVANT.—Guaranty Against Injury.—Scope of Guaranty.

—Where a servant, a young girl of fifteen years, employed in a laundry to iron flannels with a flat-iron, was, over her objection, set to operating a "mangle," upon the assurance of the master that it was not difficult to manage or dangerous to the operator, "and that he (the master) would take all the risk of any accident that might occur to her by reason of her operating said mangle," the guaranty of the master against injury did not extend to injuries received through the servant's own negligence, but only such as might befall her by reason of the master's negligence or by reason of the natural dangers incident to the use of the machinery when operated by her in an ordinary and prudent manner.

SAME.—Contributory Negligence.—Voluntary Act.—That the injuries complained of were not the result of plaintiff's negligence nor of a voluntary act which must inevitably result in injury, see opinion.

SAME.—Guaranty Against Injury.—Scope of Guaranty.—Under such guaranty, if the servant used ordinary care, such as was to be expected of one of her age, intelligence and experience, and nevertheless was injured, the master agreed to answer therefor, and is liable.

SAME.—Servant of Tender Years Chargeable with Knowledge of what Is Dangerous.—At the age of fifteen any child of ordinary intelligence must know that to place its hand on a bar of iron heated to a great heat must burn, or to place its fingers between two heavy rollers, where the space is too small to admit them, must result in their being crushed.

INTERROGATORIES TO JURY.—When General Verdict Can Not Stand.—

If the jury, in answer to interrogatories, find a material fact contrary to what they must have found in order to have reached the general verdict, the general verdict can not stand.

From the Allen Superior Court.

L. M. Ninde and W. H. Shambaugh, for appellant.

Colerick & France, for appellee.

Ross, C. J.—The appellee, Herman Michaels, as the guardian of Iva Weaver, a minor, brought this action against the appellant, to recover damages for personal injuries received by her while in appellant's employ. Upon a

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trial by jury, a verdict was returned in favor of appellee in the sum of twenty-nine hundred dollars, judgment was rendered by the court, but afterwards reduced by a remittitur filed by appellee, to eighteen hundred dollars.

The material allegations of the complaint are, that on the 28th day of August, 1892, plaintiff's ward, Iva Weaver, was employed by the defendant to work in a laundry owned and operated by him in Fort Wayne, Indiana; that at the time of her employment she was between fifteen and sixteen years of age, and prior to said employment had never worked "at any trade or business other than assisting her mother in her household duties, and that she was wholly untaught and inexperienced in all other trades and occupations, and had no knowledge of laundry work as conducted at defendant's shop;" that she was employed to iron flannels with a flat-iron, "and for no other service;" that on the 30th day of September, 1892, the defendant's foreman set her to work at a machine operated by steam and called a "mangle;" that this machine, which was used for ironing sheets, pillow cases, linens and other muslins, "consisted of a round iron bar which operated rapidly in revolving in close proximity to a parallel, but immovable, bar of iron," both of which bars "being heated to such a degree of heat as is required in flat irons when required for ironing purposes, and to such a degree as to burn and destroy flesh that came in contact therewith; that she did not know how to operate the machine, and was afraid to undertake it; that defendant's foreman informed her that there was no danger in operating it, and that it required no previous experience to do so, whereupon she commenced work upon the machine and continued to so work for the period of one week, at which time she informed defendant (who, from a time previous to her be-

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ing so set to work until that time, was absent) that she had been taken from her former occupation and set to work on the "mangle;" "that she had no experience in the operation of said machine; that she believed it to be dangerous, and that she desired to quit work thereupon;" that he then told her it was not difficult to manage or dangerous to the operator, "and that he would take all the risk of any accident that might occur to her by reason of her operating said mangle;" that afterwards, on the — day of October, 1892, while she "was carefully and prudently operating said machine" her thumb and fingers were drawn into and between the heated iron bars, and her fingers, hand, and arm "horribly mashed, torn and burned, wholly forever destroying all use of said hand, and crippling said hand for life. It is also averred that she in no way contributed to her said injuries.

The theory of this complaint is not like the ordinary action charging negligence on the part of the defendant and want of contributory negligence on the part of the plaintiff, but it seeks a recovery upon the guaranty of the defendant, wherein, as charged in the complaint, the defendant agreed, in consideration of her continuing to use the mangle, "that he would take all the risk of any accident that might occur to her," which might be the result of her operating the machine. This is the theory of the complaint, and upon this theory alone can the action be maintained.

The errors assigned in this court are as follows:

1st. The court erred in overruling appellant's motion for judgment in his favor upon the special findings of the jury, notwithstanding the general verdict.

2d. The court erred in overruling appellant's motion for a new trial.

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3d. The court erred in sustaining appellee's motion for judgment on the verdict.

The first and third will be considered together, for if the first is not well taken, the third is also untenable. The verdict is a general one, regular in form, and sufficient on its face to support a judgment.

With their general verdict, the jury answered, and returned a number of interrogatories submitted to them at the request of both parties. These interrogatories, seventy-seven in number call for facts permissible under the issues, but so far as we have been able to ascertain, or so far as our attention has been called thereto, no material fact necessary to the maintenance of appellant's action has been found adverse to the verdict. Several of the answers are apparently irreconcilable, one with the other, but under the issues, as we view the theory of the complaint, it is immaterial whether they can be reconciled or not. As to whether or not the defendant assumed the responsibility of appellee's ward operating the machine, and guaranteed her against the injury, the jury in answer to interrogatory number eleven, of those submitted at the request of the plaintiff, found that he did. The general verdict in favor of the plaintiff is a finding that the defendant was injured in the manner alleged, and that the defendant guaranteed her against injury. There is no such conflict therefore between the general verdict and the answers to the interrogatories, that they can not be reconciled one with the other. Answers to interrogatories overcome the general verdict only when both can not stand. In other words, while every presumption is indulged in favor of the correctness of the general verdict, and that the jury have found proven by a preponderance of the evidence every material fact necessary to sustain it, yet, if the jury in answer to an interrogatory find a material fact contrary

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to what they must have found in order to have reached the general verdict, the general verdict is wrong, and can not stand, hence the answer to the interrogatory overcomes the general verdict, for the reason that it shows that the jury's verdict is not based upon all of the facts necessary to its validity. *Evansville, etc., R. R. Co. v. Weikle*, 6 Ind. App. 340, and cases cited.

This leads us to the consideration of the only other error assigned, namely, the court's ruling on the motion for a new trial.

The reasons for which a new trial was asked were thirteen in number, many of which, however, have not been discussed by counsel, hence will not be considered by this court. Questions presented by the record, but which are not discussed by counsel, are deemed to be waived.

Counsel have cited and quoted from many authorities not only of this court, and the Supreme Court of this State, but of the courts of last resort of other States, holding that one who undertakes to use machinery in the operation of which more or less danger attaches, which dangers are open and obvious, assumes the risk thereof. This is a proposition of law so well settled that it seems hardly necessary to cite any authority in support of it.

In the case under consideration, however, the natural risks were not assumed by the appellee because she undertook to do the work upon the guaranty of the appellant that for the risks naturally incident to the operation of the machine he would answer for her safety. The question, however, arises to what extent the guaranty of appellant applies, and whether, if the injury was the result of appellee's own negligence alone, appellant is liable. What did appellant undertake to protect appellee from; only the usual risk incident to the operation

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of the machine, or did he also undertake to guarantee her as against her own negligence? We think it clear that the appellant did not undertake to compensate Iva Weaver for injuries received through her own negligence, but only such as might befall her by reason of appellant's negligence or by reason of the natural dangers incident to the use of the machinery when operated by her in an ordinarily prudent manner. If the evidence in this case is sufficient to show that the "mangle" which was operated by appellee's ward was dangerous, and that she was injured because it was so, and that she was inexperienced, and incapable of appreciating the danger, then the verdict is right. But if, on the other hand, the evidence is such as shows that the machine was not dangerous to operate, and that the injury sustained by appellee's ward was the result of her own negligence, the verdict is wrong, and must be set aside.

The law recognizes that an infant is not held to that strict accountability that is exacted from an adult. But if the child is not so young as to escape all legal accountability, yet is sufficiently matured to be able to reason for itself and to know and appreciate danger, it is to be held responsible for the exercise of such care as it is expected that a child of ordinary intelligence of that age is capable of exercising under like circumstances. This rule rests upon sound reason, and has the support of both text writers and the courts. Beach Contrib. Neg. (2d ed.), section 136; Shear. & Redf. Neg., section 73; 2 Thompson Neg., p. 1180, section 31; *Wright v. Detroit, etc., R. W. Co.*, 77 Mich. 123; *Railroad Co. v. Stout*, 17 Wall. 657; *Baltimore, etc., R. W. Co. v. McDonnell*, 43 Md. 534; *Robinson v. Cone*, 22 Vt. 213; *Birge v. Gardner*, 19 Ct. 507; *Costello v. Syracuse, etc., R. R. Co.*, 65 Barb. 92; *Lynch v. Smith*, 104 Mass. 52; *Pittsburgh, etc., R. W. Co. v. Caldwell*, 74 Pa. St. 421.

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A child but three or four years of age knows, whether from instinct or mental reasoning, that fire will burn, and to touch it must result in injury. The older the child the more acute the senses become to the perception of danger, and the more capable it becomes of exercising the faculties for its own preservation. To say that a child ten years of age, except it be idiotic, does not know that to put its hand in fire must result in the hand being burned, would be to place a very low estimate upon the intelligence of children, and cast serious reflections upon the law itself.

As said by the Supreme Court of Massachusetts, in the case of *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182: "In hiring a boy twelve years of age, and apparently of the average intelligence, an employer is not called upon to tell him that if he holds his hand in the fire it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of a revolving cog-wheel in the gearing of a mill it will be crushed."

At the age of fifteen years, any child of ordinary intelligence must know that to place its hand upon a bar of iron heated to a great heat must burn, or to place its fingers between two heavy rollers, where the space is too small to admit them, must result in their being crushed. It does not require the consideration and judgment of twelve men to establish this fact. Every sensible human being knows it, hence it is declared by the law to be true, because inevitable. That which is inevitable is always true.

So, in this case, the appellee's ward was bound to, and did, know that if her hand came in contact with the heated rollers it would be burned, or if her fingers were drawn between the rollers they would be crushed. We observe, however, in this case, that the jury trying the

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cause, in answer to interrogatories submitted to them, find that appellee's ward, although nearly sixteen years of age, and of ordinary intelligence for one of that age, did not know that if she got her fingers between the rollers she would get them injured. At the same time, in answer to another interrogatory, they find that the only danger attending the use of the "mangle" was the possibility of the operator getting her hand between the rollers.

The appellant, by this guaranty, did not undertake that appellee's ward should not get her hand against the heated irons, or run her fingers between the rollers, because he had a right to assume that she would not voluntarily do so, but he agreed that if she used ordinary care, such as was to be expected of one of her age, intelligence and experience, nevertheless was injured, he would answer therefor. This is the extent of his undertaking, and while it imposes a greater responsibility upon him than that usually imposed by the law upon a master, it does not go so far as to relieve the servant from the exercise of ordinary care for her own protection.

The evidence discloses that the appellee's ward was operating the machine in the usual and ordinary manner; that she was running a pillow case through the machine, and in order to make it go through properly, she put her thumb inside the pillow case to straighten it out, and her thumb caught and her hand was drawn between the rollers. Had she voluntarily put her fingers between the rollers, or negligently suffered them to be drawn there, the question presented would be entirely different, but the evidence tends to show that she was exercising ordinary care in the handling of the pillow case and in running it through the machine, and that the injury was the result of getting her thumb caught, causing her hand to be drawn into the machine. Although the appellant

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did not agree to protect her against an injury which was the result of her own negligence, he did agree to indemnify her against any accidental injury.

There is evidence tending to support the verdict, hence we can not say that the court below erred in overruling the motion for a new trial on that ground.

No error has been pointed out warranting a reversal of the judgment.

Judgment affirmed.

Filed Jan. 30, 1895.

No. 1,405.

SIRK v. MARION STREET RAILWAY COMPANY.

NEGLIGENCE.—Proximate Cause.—It does not aid the plaintiff in an action based upon a negligent tortious act or omission to show negligence on the part of the defendant, unless such negligent act be also the proximate cause of the injury.

SPECIAL VERDICT.—When Not Aided by Inference or Intendment.—How Construed.—A special verdict will be construed reasonably and fairly, but it must contain within itself, without aid by intendment or inference, other than those which necessarily follow, all those essential facts which are required to authorize a recovery by the party upon whom rests the burden of proof.

STREET RAILROAD.—Personal Injury of Passenger.—When Not Liable.—Contributory Negligence.—Giving Signals.—Where a street-car passenger gave a signal (as it was the custom of passengers to sometimes do) to stop at the next street crossing, and in obedience to the signal the motorman slowed up at the crossing and came almost to a standstill, when the passenger gave another signal (as she intended) to stop, and about the same time stepped from the car, and while she was in the act of alighting the speed of the car was greatly accelerated, causing her to fall to the ground, etc., the railroad company is not liable in damages for injuries sustained, it not appearing but that the second signal given by her was the regular signal to start up the car, nor that the motorman knew, or by the exercise of due care might have known, that she was not yet off, but was in a

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position of danger should he start up the car, nor that the car would not have come to a full stop had she delayed giving the second signal.

From the Blackford Circuit Court.

J. C. Branyan, J. S. Branyan, J. F. France, B. G. Shinn, E. Pierce and G. E. Meyers, for appellant.

W. H. Carroll and G. D. Dean, for appellee.

GAVIN, J.—The appellant sued appellee for damages on account of injuries received while endeavoring to alight from its street car. The case comes to this court on a special verdict, upon which judgment was rendered in appellee's favor.

The leading facts, briefly stated, which appear in this verdict, are that on April 24th, 1892, appellee was operating a street railway in the city of Marion; that appellant became a passenger on one of its cars and paid appellee the usual fare from the point where she entered to Twenty-sixth street; that appellant ran a motor and trailer coupled together, both in charge of a motorman and a conductor, whose duty it was to control and operate the car for the convenience and safety of its passengers, to give signals for starting and halting, and to see that passengers were afforded an opportunity to enter the car and alight therefrom in safety; that it was the usual custom of appellee to provide a conductor for each car, but for these two cars one only was provided, and he a youth of 17 years of age; "that when the cars reached Twenty-sixth street the conductor was in the rear coach collecting the fares, and that a signal was given about fifty feet before reaching Twenty-sixth street for said car to stop, which signal was given by appellant, as was the custom of passengers to sometimes do; that said signal was heard by the motorman, who slowed up and came to almost a halt, but did not stop, when another signal

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was given to halt, as intended by plaintiff, and that at the time of giving said signal she was about to alight from said car, but that said conductor paid no attention to said signal nor to said passenger, this plaintiff, and that at said time said car was moving slowly and as she stepped upon the platform to alight it was suddenly propelled forward and precipitated her upon the ground by said quickened motion of said car" whereby she was injured; that while so alighting appellant did not believe she was in danger and received no notice or warning of danger therein; "that the defendant was guilty of not providing an additional conductor or help in the management of said car, and was guilty of putting upon said cars in management of the same so young and inefficient a conductor," and was "guilty of not coming to a full stop at Twenty-sixth street that plaintiff might alight in safety."

The phraseology of these last two clauses is peculiar and just what is intended to be found by them is not clear, although we presume it was meant by "guilty" "negligent." This, at least, is the construction most favorable to appellant.

Appellant seeks to recover for injuries received by reason of appellee's negligence. In such actions the law is well settled that it must appear that the defendant's negligence was the proximate cause of the injury, and that the plaintiff was free from contributory negligence. Both these elements must concur, and the burden is upon the plaintiff to establish both. *Citizens' St. R. W. Co. v. Twiname*, 111 Ind. 587; *Booth St. Railway*, sections 378-381; *City of Valparaiso v. Ramsey*, 11 Ind. App. 215.

It does not aid the plaintiff to show negligence upon the part of the defendant, unless such negligent act be also the proximate cause of the injury.

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The facts essential to appellant's recovery must appear in the special verdict. A special verdict is not to be scrutinized and examined as with a microscope to bring to light infinitesimal defects and subtle and refined distinctions so shadowy as to be practically unreal. *Becknell v. Hosier*, 10 Ind. App. 5.

It is to be construed reasonably and fairly (*Branson v. Studabaker*, 133 Ind. 147), but it must contain within itself, without aid by intendment or inference, other than those which necessarily follow, all those essential facts which are required to authorize a recovery by the party upon whom rests the burden of proof. *Gordon v. Stockdale*, 89 Ind. 240; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Noblesville, etc., Co. v. Loehr*, 124 Ind. 79; *Sult v. Warren School Tp.*, 8 Ind. App. 655.

From this verdict, we regard it as clear that appellant's counsel are right in their assertion that the proximate cause of the injury was the sudden jerk caused by the acceleration of speed as appellant stepped from the slowly moving car. We are unable, however, to see how it can be said that the verdict affirmatively shows that this jerk was caused by the negligence of appellee and without any contributory negligence upon appellant's part. It may well be that the verdict does not show affirmatively appellee free from fault and appellant in fault, but to hold this enough would be to reverse the rule applicable in such cases.

So far as appears from the verdict, appellant in no other way informed the appellee of her desire to leave the car at Twenty-sixth street than by the signal given by herself to the motorman, in pursuance of which he slowed up and came to almost a stop, when she gave another signal, intended by her, indeed, as a stopping signal, but which may well have been the regular signal to start up the car. If it was, there was no negligence

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in the motorman's obeying it, unless he knew, or, by the exercise of due care, might have known that appellant was not yet off, but was in a position of danger should he start up the car. Nothing of this kind is found. So far as the verdict shows, the motorman and conductor were as ignorant of her danger as she was herself. Nor does it appear that the car would not have come to a full stop had appellant delayed giving the second signal. Plainly, we must, according to the rules of law, presume the starting to have been induced by this second signal. Had this signal been given by the conductor, or had the motorman started up without any signal, and before appellant had safely alighted from the car, it might be urged that it was appellee's duty to see that she had safely reached the ground before causing the car to start, as in *Anderson v. Citizens' Street R. W. Co.*, 38 N. E. Rep. 1109.

So far as we can ascertain from this verdict, appellant's mishap was caused by her own unnecessary act rather than by any negligent act of the appellee.

Judgment affirmed.

Filed Jan. 18, 1895.

No. 1,406.

BEDFORD v. SPILMAN.

SPECIAL FINDING.—*When will Override General Verdict.*—The special findings override the general verdict only when both can not stand, and this antagonism must be apparent upon the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of a party against whom a general verdict has been rendered.

SAME.—*Facts Found.*—*Malpractice.*—For special findings that do not

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override the general verdict in favor of plaintiff, in an action for malpractice in failing to properly reduce a fracture of a bone and replace dislocated parts of the wrist, etc., see opinion.

From the Marion Superior Court.

W. J. Beckett and *W. S. Doan*, for appellant.

S. M. Shepard, for appellee.

DAVIS, J.—The only question discussed by counsel for appellant is the ruling of the trial court upon appellant's motion for judgment upon the answer of the jury to the interrogatories, notwithstanding the general verdict, and the affirmance of said ruling in the general term of that court.

The first paragraph of the complaint charges in substance that appellee accidentally fell and injured her left arm and wrist and that she called appellant, who was holding himself out to the public as a competent physician and surgeon, and employed him to treat her said injuries for a reasonable compensation; that said appellant, after examining appellee's injured arm and wrist, pronounced it a sprain and treated it as such, when in fact there was a fracture of one of the bones of the arm and a dislocation of the small bones of the wrist; that said appellant did not, as he should have done, reduce said fracture and replace the said dislocated parts; that said appellant so negligently and unskillfully treated the appellee's injuries as to make the same a permanent injury; that such careless and negligent treatment added greatly to the pain and suffering of appellee and has greatly impaired the usefulness of appellee's said arm and wrist, etc.

The facts are more fully and specifically pleaded in the second paragraph of the complaint. This paragraph alleges, among other things, that appellee followed the directions of appellant during such treatment, and that

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the treatment of appellant resulted in the crippling and the permanent disablement of appellee's wrist, arm and hand; that appellant told appellee that said injury was merely a severe sprain and treated it as such, when in fact the said bones were fractured and displaced, as stated in a former part of the paragraph, and that said appellant, by his negligence, want of skill and care, neglected to reduce said fracture and replace the said dislocated parts, and left the same without any adjustment, so that the said wrist and adjacent parts are now enlarged, stiff and comparatively useless; that by reason of said unskillful treatment, etc.

The appellant answered in two paragraphs. The issues were submitted to a jury for trial, which returned a general verdict in favor of appellee for fifty dollars. In answer to interrogatories, the jury found that appellant pronounced said injury a severe sprain; that he bandaged the injury and ordered hot water and vinegar; that she was injured on the 31st of December, 1892; that he saw her first on January 1, 1893, at her home; that she called at his office ten days later and again on January 15; that she called a third time at his office on February 3d and again on the 19th of March, when she threatened him with a damage suit; that he then informed her that he could still make her a fairly good wrist if she would give him an opportunity; that appellee needed medical treatment after March 19 on account of her injured wrist, but that she never called at appellant's office after that date; that appellee has not received any treatment for her injured wrist since March 19, 1893; that appellee did not give appellant a fair opportunity to heal her injured wrist; that appellant did not treat appellee's injured wrist with ordinary skill and care; that he was negligent and unskillful in not telling her to call at his office for treatment and in not using proper appliances.

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The language, in substance, recently used by us in another case is applicable here: The only question presented for our consideration is whether appellant was entitled to judgment upon the answers of the jury to the interrogatories notwithstanding the general verdict. The jury, by their general verdict, have presumably found every material allegation in the complaint to have been proven; and that presumption conclusively prevails in this court unless the contrary is clearly shown by the answers to the interrogatories. *Cleveland, etc., R. W. Co. v. Johnson*, 7 Ind. App. 441.

"The special findings override the general verdict only where both can not stand, and this antagonism must be apparent upon the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of a party against whom a general verdict has been rendered. *Amidon v. Gaff*, 24 Ind. 128;" *Indianapolis, etc., R. W. Co. v. Ott*, 11 Ind App. 564.

In the language of Judge ELLIOTT in another case: "It is also true that the answers to the interrogatories can not control the general verdict if they are contradictory, although the verdict may be in irreconcilable conflict with some of these answers. *Mitchett v. Cincinnati, etc., R. W. Co.*, 132 Ind. 334." *Young v. Mason*, 8 Ind. App. 264.

In this case the jury, by their general verdict, find that appellant, by his negligence, want of skill and care, failed to reduce the fracture and to replace the dislocated parts, and that he left the same without any adjustment, and, that by reason of such unskillful treatment, the said wrist and adjacent parts are now enlarged, stiff and comparatively useless. The jury do not, in answers to the interrogatories, find that appellee was guilty of any

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negligence on her part contributing in any degree to the injuries occasioned by the unskillful and negligent treatment of appellant. The jury do find that he informed her that he could still make her a fairly good wrist if she would give him an opportunity, but they do not find that this information was correct.

We quote from the decision in *Young v. Mason, supra*: "All we deem it necessary to say on this subject is that when we refer to the allegations in the complaint to which we have heretofore called attention, which, in view of the general verdict, so far as the question now under consideration is concerned, we must regard as having been proven on the trial, the court can not say, as a matter of law, in the absence of an express finding to the contrary, that the appellant was not injured or inconvenienced by reason of the alleged negligence of the appellee in failing to reduce the fracture near the wrist joint."

In this case the finding included in the general verdict that appellee was injured and inconvenienced by reason of the alleged negligence of appellant, is not controverted by the facts specially found in answer to the interrogatories. Neither is it affirmatively found that appellee, by reason of disobedience to the directions of appellant or otherwise, was guilty of any negligence that contributed to the injuries caused by the unskillful treatment by appellant.

The jury do find that she did not give him a fair opportunity to heal her injured wrist; and they also find, in the same connection, that he did not treat her injured wrist with ordinary skill and care, but they do not find that he could or would have improved her condition if she had given him further trial. If he could have made her a fairly good wrist, if she had given him an opportunity, this would not have relieved him from liability

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on account of the injuries she had sustained on account of his previous failure to exercise ordinary skill and care, and to which injuries she did not, by want of care on her part, in any degree contribute.

Without further discussion, it will suffice to say, in the light of the principles enunciated in *Young v. Mason, supra*, that, in our opinion, the facts specially found by the jury in this case in answer to the interrogatories are not sufficient to overthrow the general verdict.

Judgment affirmed.

Filed Jan. 17, 1895.

No. 1,432.

SLOAN v. FAUROT.

APPEAL.—*From Judgment by Default.*—An appeal lies from a judgment by default.

SAME.—*Appellate Court Practice.*—*Joint Appeal from Judgment by Default and from Ruling on Motion to Set Aside Default.*—Where a motion to set aside a judgment by default is overruled, and appeal is taken, in which errors are assigned questioning the sufficiency of the complaint, and also the ruling of the court on the motion to set aside, and no objection is made to the assignment of errors as for a misjoinder, the appeal is as much from the judgment by default as from the ruling on the motion to set aside, and the court can not disregard it in either case.

SAME.—*From Judgment by Default.*—*Sufficiency of Complaint.*—*Not Aided by Judgment.*—When the appeal is from a judgment taken by default, the rule that the complaint will be held sufficient unless there is an entire failure to state a cause of action, does not apply; and in such case the complaint is not cured by the verdict or finding.

PLEADING.—*Complaint to Foreclose Street Assessment Lien.*—*Assessment Roll as Exhibit.*—In an action to foreclose a street assessment lien, a copy of the assessment roll, or at least that portion of it which relates

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to defendant's property, should be made an exhibit of the complaint, to make the complaint sufficient on demurrer or on appeal from judgment by default.

From the Marion Superior Court.

W. W. Herod and *W. P. Herod*, for appellant.

C. L. Holstein and *C. E. Barrett*, for appellee.

REINHARD, J.—The appellant is the owner of a lot in the city of Indianapolis. The appellee was the contractor for certain street improvements on account of which an assessment was placed against the appellant's property. The appellee brought an action to foreclose the lien asserted by him as such contractor, by reason of the said improvement and assessment. There was no appearance to the action by the appellant, and judgment was rendered against her by default. Subsequently the appellant sought to have the default and judgment set aside, but the court overruled her application. He appealed to the general term of the superior court, where the judgment of the special term was affirmed.

The assignment of errors, both in this court and in the superior court call in question:

1. The sufficiency of the complaint.
2. The correctness of the court's ruling in denying the motion to set aside the default.

The appellee's learned counsel insist that no question is raised as to the sufficiency of the complaint, because the appeal is not from the decree rendered on default of the appellant, but from the ruling of the court in refusing to set aside the judgment by default. We do not regard this position as tenable.

We think it is now settled that an appeal lies from a judgment by default. *Baldwin v. Humphrey*, 75 Ind. 153; *Old v. Mohler*, 122 Ind. 594.

It is, of course, not disputed that an appeal may be

taken from the judgment of the court refusing to set aside the default.

It may be possible that separate appeals are necessary in such a case, but as to that we do not decide anything. But if that be the true practice, some objection must be taken, it seems to us, to the assignment of errors, as for a misjoinder. No such objection has been interposed, and both assignments stand. The appeal is, therefore, as much from the judgment by default, as it is from the ruling upon the motion to set aside the judgment by default. We have no more right to disregard it in the one case than in the other.

The confusion arising, in such cases is, doubtless, attributable to the questionable practice of allowing an appeal at all from a judgment by default, where no effort has been made in the lower court to set the same aside. Elliott's App. Proced., section 334.

But this we have no power to remedy.

We, therefore, regard the question of the sufficiency of the complaint as properly before us. When the appeal is from a judgment taken by default, the rule that the complaint will be held sufficient unless there is an entire failure to state a cause of action does not apply. The rule appears to be, in such cases, that if the complaint is not such as would withstand a demurrer it may be first assailed by an assignment of errors in this court. Elliott App. Proced., section 475, and cases cited; *Cleveland, etc., R. W. Co. v. Tyler*, 9 Ind. App. 689.

In such a case the defects in the complaint can not be said to be cured by the verdict or finding, for the ample reason that no trial has been had.

The first objection urged to the complaint is that neither the assessment roll nor a copy thereof is made a part of or filed as an exhibit with the complaint. It is claimed on behalf of appellant that the assessment is the

foundation of the cause of action, and therefore an imperative requirement of the statute is that it, or a copy of it, be made a part of the complaint.

The law under which the alleged assessment was made is what is usually known as the city charter of Indianapolis. Acts 1891, p. 180, section 82.

Section 77 of said act provides for the making out of an assessment roll with the names of the property-holders and description of the property adjoining the place of the proposed improvement, which roll shall also have set opposite each name and description the total *pro rata* assessment against each piece of property. When completed the assessment roll shall be delivered to the head of the department of finance. Acts 1891, p. 177.

By section 78 it is made the duty of the department of finance, whenever the Board of Public Works shall approve and accept the entire work under any contract, and allow a final estimate therefor, to forthwith deliver to the treasurer a certified copy of the assessment roll, which shall be known as the local assessment duplicate, upon which assessments shall be extended, much as taxes are extended upon the tax duplicate. Acts 1891, p. 177, *supra*.

It is apparent from these provisions that the appellee's lien, if he have any, is based upon the assessment roll.

We are of opinion that a copy of the assessment roll, or at least that portion of it which relates to the appellant's property, should have been made an exhibit of the complaint. *Gossett v. Tolen*, 61 Ind. 388; *Busenbark v. Etchison Ditching Assn.*, 62 Ind. 314; *Boatman v. Macy*, 82 Ind. 490; *McCarty v. Burnet*, 84 Ind. 23; *Crist v. State, ex rel.*, 97 Ind. 389; *Neiman v. State, ex rel.*, 98 Ind. 58; *State, ex rel., v. Myers*, 100 Ind. 487; *Laverty v. State, ex rel.*, 109 Ind. 217.

Appellee's learned counsel contend that a different rule obtains in cases of foreclosure of liens for street im-

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provement assessments from that governing the enforcement of liens for ditch assessments or mechanics' liens, the class of cases embraced in the foregoing citations. We are unable to draw any distinction in principle between the rules governing this point in the different classes of cases mentioned. If the assessment be the foundation of the action in the foreclosure of a lien for a drainage assessment, and if it be necessary to file such assessment or a copy thereof as an exhibit with the complaint, we can see no good reason why the same should not be required in an action to foreclose a lien for a street improvement assessment. Indeed, the Supreme Court has decided that all such cases are analogous and that, in the respect mentioned, they are governed by the same rules. *Van Sickle v. Belknap*, 129 Ind. 558.

In the case at bar, the foreclosure of the lien was the only relief sought. Without an assessment at least *prima facie* valid, the appellee would not be entitled to the relief asked, and consequently to no relief whatever. Without the assessment roll, or a copy thereof, as an exhibit, the complaint would be insufficient upon demurrer, and hence it is also insufficient when tested in the manner here adopted.

Other defects pointed out may be corrected in another trial, and need not be further considered at present. It is proper to say, however, that we do not regard the complaint as defective for failing to allege a demand upon the appellant for the money before suit. In such cases it may be the part of moral honesty and fair dealing that the contractor should request payment of the property-owner before subjecting him to the payment of unnecessary costs and attorney's fees, but without a statute the law makes no such requirement of the contractor. The legal presumption is that the owner, if he has had the notice which is necessary to fix the lien,

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knows as well as does the contractor when the debt is due. The wisdom and expediency of requiring the contractor to give some notice to the owner that the debt is due, or to request payment thereof, before suit, are for the legislature, and not for the courts to determine.

Judgment reversed.

Filed Jan. 31, 1895.

No. 1,290.

STEPHENSON v. ELLIOTT.

INSTRUCTIONS TO JURY.—*How Made Part of Record.*—*Filing, etc.*—Instructions given, in order to be made a part of the record, must be filed, and the fact of the filing must be shown in the transcript.

APPELLATE COURT PRACTICE.—*Sufficiency of, and Weight of, Evidence.*—The appellate tribunal will not weigh conflicting evidence, nor reverse where there is evidence tending to support the finding of the court below.

From the Hancock Circuit Court.

D. S. Gooding, for appellant.

Offutt & Black, for appellee.

DAVIS, J.—This cause is here for the second time. *Stephenson v. Elliott*, 2 Ind. App. 233. A trial by jury, after former reversal, resulted in judgment against appellant. Two questions are discussed by counsel for appellant on this appeal.

1. That the court erred in giving instruction No. 2, asked by appellee.

2. That the verdict is contrary to the evidence.

Appellee insists that the instructions are not properly in the record. An effort has been made to bring the instructions into the record under the provisions of section 544, R. S. 1894 (section 535, R. S. 1881). There is

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nothing in the record showing that the instructions were ever filed. See subdivision 6 of section 542, R. S. 1894 (section 533, R. S. 1881). In the language of *O'Donald v. Constant*, 82 Ind. 212: "The transcript contains no copy of the clerk's notation of the filing, nor any recital that they were filed." Under the statute and the decisions in this State, the instructions can not be considered as being in the record. *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378 (393); *Beem v. Lockhart*, 1 Ind. App. 202; *Killion v. Hulen*, 8 Ind. App. 494.

The evidence is conflicting. There is, it is true, ample evidence in the record tending to sustain appellant's theory of the case. On the contrary, there is evidence on appellee's theory of the case tending to prove that appellant was not entitled to recover anything against him.

There is no reversible error in the record.

Judgment affirmed.

Filed Feb. 23, 1895.

No. 1,215.

SUTTON v. FULTON.

From the Jay Circuit Court.

J. W. Headington and *J. F. LaFollette*, for appellant.

D. T. Taylor, for appellee.

Ross, C. J.—This action was commenced by the appellee against the appellant on a contract.

The questions urged on this appeal relate to the rulings of the court on the demurrer to the complaint, and the demurrers to the third and fourth paragraphs of the appellant's answer.

In the case of *Current v. Fulton*, 10 Ind. App. 617, the questions here presented were all decided adversely to appellant. Upon the authority of that case, the judgment of the lower court herein, is, in all things affirmed.

Judgment affirmed.

Filed Nov. 27, 1894.

Wahl et al. v. Schierling.

No. 1,518.

DAVIS AND RANKIN BUILDING AND MANUFACTURING
COMPANY v. MCKINNEY ET AL.

From the Jay Circuit Court.

*J. J. M. LaFollette and O. H. Adair, for appellant.**C. Corwin and J. M. Smith, for appellees.*

DAVIS, J.—This action was brought by appellant against appellees to recover a balance claimed to be due on a contract filed with the complaint for building, completing and equipping a butter and cheese factory.

The original contract price was four thousand two hundred and fifty dollars, of which three thousand nine hundred and fifty dollars have been paid. The action was a joint one against all the appellees to recover the balance.

The court below sustained the separate demurrer of the several appellees to the complaint, and this ruling is the basis of the only error assigned in this court.

There is only one question presented for our decision and this question involves the construction of the contract sued on.

The contract, so far as the question under consideration is concerned, is identical with the contract in *Davis and Rankin Building and Manufacturing Co. v. Hillsboro Creamery Co.*, 9 Ind. App. 553, and *Davis and Rankin Building and Manufacturing Co. v. Booth*, 10 Ind. App. 364.

One of the provisions contained in each of the contracts is: "The undersigned stockholders are to be held responsible only for the individual amount subscribed by them."

On the authority of the decisions in the cases cited, the contract is the several contract of each of the appellees and not the joint contract of all.

There was no error in sustaining the demurrer to the complaint.
Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,461.

WAHL ET AL. v. SCHIERLING.

From the Jennings Circuit Court.

*S. A. Barnes, C. L. Holstein and C. E. Barrett, for appellants.**J. Overmyer and F. E. Little, for appellee.*

DAVIS, J.—On the 15th of March, 1894, appellee filed a petition in the Jennings Circuit Court showing that one Gallus Kirchner departed this life intestate in said county in 1885; that after the death

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of said Kirchner there was administration in said court on his estate; that the administrator of said estate was finally discharged by said court in 1888; that there was then no administration of said estate pending in any court of this State or elsewhere, and that there were assets belonging to the estate of said decedent within the jurisdiction of said State that had not been and should be administered, and that said petitioner was a creditor of said estate, whose debt remained unpaid, and therefore he asked to be appointed administrator *de bonis non* of said estate.

The appellants, the children of said decedent, appeared and resisted said appointment.

Nine errors have been assigned in this court.

We have carefully read the entire record in the light of the argument of counsel, and, in our opinion, the only question presented for our consideration is whether the act of March 5, 1891, is applicable to estates that had been administered upon and in which final reports had been made and approved prior to that date: Acts 1891, p. 107; section 2395, R. S. 1894.

On the authority of *Barnett, Adm.*, v. *Vanmeter*, 7 Ind. App. 45, we are satisfied the judgment of the court below should be affirmed.

It is conceded that the debts of Gallus Kirchner, deceased, have not been paid, and there is evidence tending to prove that there is a just claim in favor of his estate against the United States Government.

The only reason urged against the appointment of the administrator *de bonis non* is the approval of the final settlement report in 1888.

In the case cited, Judge REINHARD says: "By the passage of this act, it was doubtless intended to reach any assets, for the benefit of creditors, legatees or heirs which had not been administered upon in the former administration."

Under the provisions of the act of 1891, as construed by this court in the Barnett case, there is no reversible error in the record.

Judgment affirmed.

Filed Jan. 31, 1895.

No. 1,355.

FROMAN v. JENNER ET AL.

From the Crawford Circuit Court.

R. J. Tracewell and A. W. Funkhouser, for appellant.

J. L. Suddarth and J. H. Weathers, for appellees.

Ross, J.—The appellant sued the appellees to recover damages for an injury alleged to have resulted from being struck in the back by a stone thrown by blasting in the appellee's stone quarry.

Upon a trial, the jury returned a verdict for the appellees. Appellant made a motion for a new trial, which was overruled, and judgment rendered on the verdict.

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It is very earnestly insisted that the verdict of the jury is not sustained by sufficient evidence; that the evidence establishes a case entitling appellant to damages.

When the evidence is uncontradicted, this court will review it and decide whether or not the verdict of the jury is sustained by it, but when there is a conflict in the evidence upon any question essential to recovery, the right to determine that question is exclusively within the province of the jury, subject to review by the trial court, and their decision is binding on this court.

There are several issuable facts relative to which there is a sharp conflict in the evidence, namely, whether or not the appellees were guilty of negligence; whether or not the appellant was free from contributory negligence, and whether or not the injuries complained of were the result of being struck as alleged, or whether they originated from other causes.

Each and all of these questions were in issue, and a failure to prove, by a preponderance of the evidence, either that the appellees were negligent, that the appellant himself was free from contributory negligence, or that his injury was the result of appellees' negligence, would not entitle appellant to recover.

The jury having decided against the appellant with this conflict in the evidence, we are compelled to infer it was because he did not prove these facts by a preponderance of the evidence.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 1,282.

PARKER ET AL. v. SAMPLE.

From the Henry Circuit Court.

B. L. Smith, C. Cambern and L. P. Newby, for appellants.

M. E. Forkner and J. M. Morris, for appellee.

DAVIS, J.—This was an action to recover damages for personal injuries sustained by appellee in operating a saw in appellants' factory.

The only question discussed is the assignment of error that the court below erred in overruling appellants' motion for a new trial.

It is alleged in the complaint that appellants owned and operated a factory for making boxes; that "the machinery was run by a small portable boiler, which furnished, when run to its full capacity, barely sufficient power to operate the saws in a safe and proper manner;" that a few days prior to the injury, appellants employed an engineer to run the engine and boiler; "that said engineer was wholly inexperienced and had had but little, if any, experience in running machinery of the kind named, and no experience in running or operating said boiler," which facts were well known to appellants; that said engineer, by reason of his incompetency and inexperience, allowed the steam to run down in said boiler, by which the power ran

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down and became insufficient to run the saws in said factory, one of which was being operated by appellee, and by reason of the decrease in the power, caused the speed of the saw, operated by appellee, to be so reduced that it caught the material being sawed by appellee and threw his hand against said saw.

The charge in the complaint is that appellee was injured through the negligence of the engineer in not keeping up a proper rate of speed of the saw appellee was operating. The only charge against appellants is that they were negligent in employing an incompetent and unskillful engineer, knowing him to be incompetent. It may be conceded that appellants can not be held liable in this action for appellee's injury, even if it was caused by the negligence of the engineer, unless the engineer was incompetent and unskillful, and the appellants knew of this incompetency and unskillfulness and appellee was ignorant of this fact.

The sole contention of counsel for appellants on this appeal is that there is no evidence whatever in the record tending to prove that appellants negligently employed or retained an incompetent and unskillful engineer to run the boiler and engine, knowing him to be incompetent.

In the light of the argument of counsel we have carefully read the voluminous record of the evidence, and although in some respects the evidence is neither clear nor satisfactory, we find some evidence, at least, fairly tending to prove that appellee was injured on the second day of his service for appellant; that McMullen, the engineer in charge of the engine on this occasion, was negligent and careless in the discharge of his duties, and that before the accident, without just cause, he left his post of duty and allowed the power to go down; that he had been in the service of appellants for three years brick making, off-bearing, in the saw mill, and working in their yards sticking lumber, and doing first one thing and then another; that he had occasionally had charge, temporarily, for a short time, of the engine when the engineer was out; that at the time of appellee's injury, and for several days prior thereto, the regular engineer was sick, and that on this occasion McMullen was running the engine temporarily until he recovered; that he had no experience as an engineer, except as above indicated, and the additional circumstance that he had been around and about the engine more or less when it was in charge of the regular engineer, and considered himself fully qualified to run it; that prior to the accident, he started the pumps in the engine without turning the proper valves, and burst the pumps; that appellants called Mr. Cox to assist him in fixing the pumps.

All the facts and circumstances in connection with the experience and qualifications of McMullen as an engineer, and of the knowledge of appellants in relation to his competency and skillfulness were before the jury. They saw him, and also the appellants on the witness stand, and heard them testify, in relation to his experience and qualifications as an engineer, and to the facts in relation to his employment, and were in much better position to determine the question as to his qualifications, and the care exercised by them in his employment than this court is. The jury on the facts and circumstances disclosed by the evidence, evidently reached the conclusion that the engineer was incompetent, and that appellants had failed to exercise due care in employing him, and this conclusion has in its support the approval of the trial judge, who also saw and heard the living witnesses on whose testimony this conclusion was based.

It does seem to us that the evidence on this proposition was not

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strong, and, perhaps, if the question was an open one before us we might reach a different conclusion, but we would not be authorized, under the long established rule which prevails in this State, in saying that there is no evidence in the record fairly tending to support the inferences drawn by the jury and the trial judge, that the engineer was incompetent, and that appellants knew, or in the exercise of ordinary care should have known, that he was incompetent, and that his negligence as the result of such incompetency was the proximate cause of appellee's injury.

There is no reversible error shown by the record on the question presented.

Judgment affirmed.

Filed Dec. 12, 1894.

No. 1,449.

SPAULDING v. SONES.

From the Elkhart Circuit Court.

O. T. Chamberlain and *P. L. Turner*, for appellant.

H. D. Wilson and *W. J. Davis*, for appellee.

Lorz, J.—The questions involved in this appeal are identical with those involved in the cause of *Spaulding v. Sones*, 11 Ind. App. 562, No. 1448, decided at this term, and upon the authority of that case this cause is affirmed.

Filed Jan. 18, 1895.

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3. *Motion to Strike Out Pleading*.—*How Assigned*.—A ruling of the court on a motion to strike out a pleading must be separately assigned as error, and not as a ground for a new trial, and must be presented by bill of exceptions or special order of court.

Huggins, Admr., v. Hughes, 465

ATTORNEY AND CLIENT.

Care and Skill.—*Soundness of Opinions*.—*Instruction*.—An instruction that an attorney is responsible to his client only for the ordinary care and skill, and reasonable diligence, and that the skill required has reference to the character of the business undertaken; that if he is employed to bring suit, and undertakes to do so but negligently fails, he is liable for resulting loss; that there is no implied agreement that the attorney will guarantee the success of his proceedings or the soundness of his opinions; that he only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence and skill would commit, is sound.

Kepler v. Jessup, 241

BASTARDY.

Jurisdiction of Person.—*Plea in Abatement*.—*Burden of Proof*.—*Appellate Court Practice*.—The burden is upon the defendant in a bastardy proceeding to establish his plea in abatement for non-jurisdiction of his person, and where there is evidence to support the finding of jurisdiction, the appellate tribunal will not determine where the preponderance lies.

Henwood v. State, ex rel., 636

BEQUEST.

See WILL.

BILL OF EXCEPTION.

See PRACTICE, 6.

1. *When not Properly in the Record*.—*Date of Presentation*.—The statute provides that "the date of the presentation shall be stated in the bill of exceptions," and an indorsement upon margin of the bill, signed by the judge, which states the time when it was presented, does not meet the requirements of the statute.

Miller v. Blue, 288

2. *When Not Properly in Record*.—*Time for Filing*.—*Order-Book Entry*.—An order granting time to file a bill of exceptions after term must be made during term and must appear in the order-book.

A recital of the fact in the bill of exceptions is not sufficient, nor is such a recital in the order-book, made at the time of filing the bill, sufficient. *DePauw University v. Smith, 313*

3. *Time for Filing.—When Not Sufficiently Shown.*—Where it appears in the bill and in the entry showing its filing that it was presented and filed "within the time allowed by the court," it is not sufficient to make it a part of the record. *Id.*

BOND.

See COUNTY, 3; INTOXICATING LIQUORS, 1; TAXES, 2.

BRIDGE.

See COUNTY, 2.

BURDEN OF PROOF.

See BASTARDY; INSTRUCTIONS TO JURY, 5; LIFE INSURANCE, 11.

CARE.

See RAILROAD, 9, 10.

CHATTEL MORTGAGE.

See LIFE INSURANCE, 8.

CLERICAL ERROR.

See APPELLATE COURT PRACTICE, 6.

COMPLAINT.

See APPEAL, 8; APPELLATE COURT PRACTICE, 6; CONTRIBUTORY NEGLIGENCE, 10; COUNTY, 2; FORMER ADJUDICATION; INSURANCE, 4; JUDGMENT, 1; LANDLORD AND TENANT, 1; LIBEL, 1; MORTGAGE; MUNICIPAL CORPORATION, 2, 4, 5, 8; NEGLIGENCE, 5, 23, 25; PLEADING, 1, 3, 7, 8, 13, 14, 15, 17, 18; SLANDER, 1; TAXES, 2.

COMMON CARRIER.

See RAILROAD, 12, 13, 14.

CONDITION PRECEDENT.

See INSURANCE, 10, 17.

CONSIDERATION.

See INSANITY, 2; PROMISSORY NOTE, 3; TRUST, 1.

CONSOLIDATED ACTIONS.

See APPEALS CONSOLIDATED.

CONTINUANCE.

In Discretion of Court.—Abuse of Discretion.—Reversible Error.—An application for a continuance of a cause of action is addressed to the sound discretion of the court, and the decision of the court in such matter will be revised only where it has plainly abused its discretion. That the court abused its discretion in refusing continuance, on account of absence of defendant, see opinion.

Post v. Cecil, 362

CONTRACT.

See INSANITY, 1, 3; LIFE INSURANCE, 2; MUNICIPAL CORPORATION, 5, 6; PLEADING, 14.

CONTRACTOR.

See DAMAGES, 11, 12.

1. *Abandonment.—What Amounts to.—Loan Agent and Borrower.*—The notification by a loan agent to one proposing to borrow money, that he is unable to procure the loan, and advised the borrower

to look elsewhere for the money, which he did, amounts to a mutual abandonment of the contract relating to the loan, and is binding upon both the loan agent and the borrower.

Everett v. Farrell, 185

2. *Declaration on Express, Recovery on Implied—Variance.*—A recovery may be had upon the proof of an implied promise, although the complaint declares upon an express promise. In such case there is no variance. *Pence v. Beckman, 263*
3. *Incomplete in Details.—Letters Evidencing.*—A correspondence concerning the employment of one of the writers as a special insurance agent for a State, which does not specify definitely and with certainty the work to be performed, nor indicate how long the proposed arrangement was to remain in force, or the terms and conditions upon which it could be terminated, does not make a binding contract. *Havens v. American Fire Ins. Co., 315*
4. *Acceptance of Offer.*—An acceptance of an offer to be binding must be in the words of, or must be entirely concordant with the terms and conditions of the offer, to bind the person who makes the proposition. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 12, 22; NEGLIGENCE, 3, 4, 10, 12, 21, 29, 32; RAILROAD, 8, 11; STREET RAILROAD.

1. *Parent and Child.—Is Child Twelve Years Old Sui Juris?—Law and Fact.—Railroad Depot.*—The court can not say, as a matter of law, that a boy twelve years old is incapable of taking care of himself at a depot, such question is for the jury to determine. *New York, etc., R. R. Co. v. Mushrush, 192*
2. *Walking Close to Moving Train.*—It was not necessarily negligence for such boy to walk slowly along the station platform, within a foot and a half of the train moving at the rate of two miles an hour. *Ib.*
3. *Trespasser.—Depot Platform.*—Nor was he necessarily a trespasser because he failed to leave the platform and take the shortest route home. *Ib.*
4. *General Averment.—When not Overcome by Specific Facts.*—It is not enough to overthrow the general allegation of freedom from contributory negligence that the specific facts fail to show want of negligence. *Ib.*

COSTS.

Apportionment.—Where witnesses testify upon issues as to which the defendant prevails, and also testify to other matters involved in the action, the costs should abide the result of the trial.

Kepler v. Jessup, 241

COUNTER-CLAIM.

See PLEADING, 12.

COUNTY.

1. *Claim Against.—Filing With Board of Commissioners.—Independent Action.—Time of Bringing.*—Before an action can be maintained in the circuit court on a claim against a county, such claim must first be presented to the board of commissioners for allowance or rejection, but the time fixed for taking an appeal from an order disallowing the claim is not a limitation upon the independent action. *Board, etc., v. Stock, 167*
2. *Damages.—Negligence.—Defective Bridge.—Notice to County.—Complaint.*—A complaint against a county to recover for injuries

sustained by the breaking down of a public bridge, not alleged to have been defectively constructed, must, to be good on demurrer, show that the county had notice that the bridge was unsafe a sufficient time prior to the accident to enable it to make the necessary repairs. *Ib.*

3. *Gravel Road Bonds.*—*No General Liability.*—There is no general liability resting upon counties by reason of gravel road bonds issued in pursuance of the act of March 11, 1877 (R. S. 1894, section 6861). *Walker v. Board, etc., 285*

COUNTY COMMISSIONERS.

See COUNTY, 1.

COVENANT.

See LEASE, 1.

CRIMINAL LAW.

See HARMLESS ERROR, 1.

1. *Intoxicating Liquor.*—*Sale on Sunday.*—*Prima Facie Case.*—*Judicial Notice.*—Courts take judicial notice that liquor is sold in saloons to be drunk as a beverage, and when such a sale is proved as having been made on Sunday and in the ordinary manner, nothing being said at the time as to what the liquor is to be used for, it establishes a *prima facie* case against the defendant. *Zopf v. State, 360*
2. *Intoxicating Liquor.*—*Sale on Sunday.*—*Purpose of.*—*Question for Trial Court.*—*Evidence.*—Whether there is sufficient countervailing evidence to raise a reasonable doubt as to the purpose for which the liquor was sold, is a question for the trial court or jury. *Ib.*
3. *Unlawful Sale of Intoxicating Liquors.*—*Sufficiency of Indictment.*—An indictment charging that defendant "did * * unlawfully sell to * * at and for the price of five cents, a less quantity than a quart at a time, to wit, one pint of * * beer, he the said * * not then and there having a license under the State law to sell intoxicating liquors," sufficiently states a criminal offense. *State v. Ashcraft, 406*

CROSS-COMPLAINT.

See PLEADING, 10, 11; PRACTICE, 4.

CUSTODIA LEGIS.

See DESCENT, 6.

DAMAGES.

See ASSESSMENT OF DAMAGES; COUNTY, 2; EVIDENCE, 2; FENCE, 1; INTOXICATING LIQUORS, 1; LEASE, 2, 6; PRACTICE, 8; RAILROAD, 1, 2, 12, 13, 22.

1. *Excessive.*—*Injury to Land by Fire.*—That the damages assessed for injury to land by fire were not excessive, see opinion. *Terre Haute, etc., R. R. Co. v. Walsh, 13*
2. *Excessive.*—*General Verdict for \$500.*—*Special Finding \$400.*—*Judgment for \$400.*—*Trespass.*—Where the theory of a complaint is to recover damages for trespass, and the jury assessed plaintiff's damages at \$500, but in answer to an interrogatory the jury found that the property destroyed was of the value of \$400, the general verdict was excessive in the sum of \$100, and the action of the court in rendering judgment for only \$400 was not erroneous. *McCormack v. Showalter, 98*

3. *Excessive.—When Sufficient Data.*—It being shown by the evidence that the deceased was nearly twelve years old, a healthy boy, ordinarily bright and intelligent, who had gone to school, learned to read and write and cipher, was a good boy to work and help do chores about the house, run errands and feed the stock, there are sufficient data to enable the jury, by the aid of the ordinary every day knowledge presumably common to every man, to assess not only nominal damages, but reasonable substantial damages for the loss of the boy's services until twenty-one.
New York, etc., R. R. Co. v. Mushrush, 192
4. *Loss of Service.—Other Employment.*—In assessing damages the jury may take into consideration any loss in the past or probable loss in the future of time or ability to earn money, by the plaintiff, in his usual vocation, in connection with the fact as to whether he had secured, or was likely to secure, by reasonable exertion, other suitable employment, together with the compensation received by him therefor, or which he might have received, or that he may receive. *Linton Coal and Min. Co. v. Persons, 264*
5. *Loss of Service.—Increased Wages in Another Employment.*—A person injured by the neglect of another is entitled to damages for the impairment of his ability, either past or future, to earn wages at his usual employment during such time as he could not, in view of his circumstances and condition, reasonably secure other suitable employment, or for the excess of wages he would probably have earned at his usual employment if he had secured, or could secure, such other employment at less wages; but for such time as he did, or could, secure such other reasonable and suitable employment, at equal or greater compensation, he would not be entitled to recover damages on account of the impairment of his ability to earn wages at his usual employment.
Ib.
6. *Loss of Service, Subsequent Employment at Higher Wages.*—The fact that the plaintiff was employed by the defendant in other than his regular vocation, after the injury inflicted, at higher wages, does not bar his right to recover damages for any loss he may suffer in the future by reason of his inability, occasioned by the injury, to follow his usual vocation.
Ib.
7. *Excessive.*—That the damages were excessive, see opinion.
Nelson, Admr., v. Spaulding, 453
8. *Excessive.—Failure to Deliver Telegram.*—That the damages assessed for failure to deliver telegram announcing death of member of family are not excessive, see opinion.
Western Union Tel. Co. v. Stratemeier, 601
9. *Excavation in Public Alley.—Violation of Ordinance.—Proximate Cause of Injury.*—Where a trench is excavated in a public alley for the purpose of tapping a public sewer in violation of a city ordinance, one whose horse, in passing along the alley, steps into the excavation and is injured, can not recover therefor by reason of the violation of the ordinance, such breach of duty not being a proximate cause of the injury.
Zimmerman v. Baur, 607
10. *Right of Abutting Owner to Dig Trench in Alley.—Consent of Municipal Authorities.—Ordinance Prohibiting Excavation.—Proof of.*—An abutting property-owner may dig a trench in a public alley for the purpose of making a sewer connection without the consent of the municipal authorities, unless there is an ordinance to the contrary, and the existence of the ordinance must be made to appear by the party having the burden of proof.
Ib.

11. *Negligence.—Independent Contractor.*—Where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the contractor. *Ib.*
12. *Respondeat Superior.—When Does Not Apply.—Case Stated.*—Where A. grants to his neighbor, B., a license to connect with the former's private sewer—a work neither dangerous nor a nuisance—and B. employs C. to do the work, the relation between A. and C. does not admit of the application of the rule *respondeat superior*. *Ib.*

DECEDENTS' ESTATES.

See EVIDENCE, 9; TRUST, 6; WITNESS.

1. *Claim, Sufficiency of.*—A claim against a decedent's estate, of the following tenor: "Estate of Robert Stewart, deceased. In account with James M. Small and Laura E. Small, wife of said James M. Small, Dr. For board, washing, sewing, nursing and expense of last sickness, watching with and caring for deceased from November 1, 1888, to September 29, 1893. Total of 256 weeks, \$2,125," is sufficient. *Stewart, Admr., v. Small, 100*
2. *Claim.—State of Indiana.—Statute of Limitations.*—The provision in section 2465, R. S. 1894, that a claim against a decedent's estate, filed after one year, shall be barred if not filed at least thirty days before final settlement of the estate, applies to a claim of the State upon a judgment on a forfeited recognizance bond; the provision of the general statute of limitations (section 305, R. S. 1894), that "limitations of actions shall not bar the State of Indiana," does not apply to claims against decedents' estates. *State, ex rel., v. Edwards, Admr., 226*
3. *Evidence.—Declarations of Claimant in Presence of Decedent.—Conclusiveness of Witness's Statement as to Presence of Deceased.*—Where a witness on behalf of the estate testifies to a conversation had between him and the claimant, in the presence of the decedent, the statute makes the evidence of the witness conclusive as to the presence of the deceased, and that fact can not be rebutted. *Kibler, Admr., v. Potter, 604*

DEED.

1. *Mortgage.—Lease.—Landlord and Tenant.—Set-Off.—Estoppel.*—A party who has the legal title to land, and treats the property as his own by leasing it to another, can not as against the latter, while seeking to recover rent from him as tenant, assert that his deed is a mortgage, and obtain a set-off of the alleged mortgage debt against a demand preferred by his lessee. *Kepler v. Jessup, 241*
2. *Instruction Assuming Character of Instrument.*—Where in a trial by jury it is a disputed question as to whether an instrument is a deed or mortgage, it is proper to refuse to give an instruction which assumes that the transaction amounts to a mortgage. *Ib.*

DEFAULT.

See APPEAL, 6, 8; JUDGMENT, 3, 4; TRUST, 5.

DEFENSE.

See PRACTICE, 1.

DELIVERY.

See TAXES, 3, 4.

DEMAND.

See TAXES, 1, 3.

DEMURRER.

See FORMER ADJUDICATION; HARMLESS ERROR, 2; PLEADING, 3, 6; PRACTICE, 4.

Argumentativeness.—Argumentativeness is not a cause for demurrer, and to overrule a demurrer to an argumentative denial is not error. To sustain a demurrer to such answer is not erroneous if a general denial is on file, under which the same facts can be proven. *Heaton v. Lynch, 408*

DESCENT.

See GIFT, 1.

1. "*Descend*" *Defined.*—*Power of Legislature.*—The word "descend" ordinarily means, in the statutes of descent, to go down; but it may mean, in the devolution of property, to "ascend"; and the Legislature has the power to give it such a meaning. *Rountree, Admz., v. Pursell, 522*
2. "*Gift, Devise or Descent,*" *Property Included by.*—The term "gift, devise or descent," as used in our statutes of descent, includes all property, both real and personal, which comes to the intestate without an equivalent or consideration being paid for it. *Ib.*
3. *Personal Property.*—*Title of Heirs.*—*No Administration.*—Heirs have title and interest in the personal estate of their ancestor before the appointment of an executor or administrator, subject to be divested by such appointment. If the personal property is not needed to pay debts of the ancestor, the heirs may distribute it among themselves without formal administration. They take the title thereto by force of the statute, in the same manner as they acquire title to the real estate. *Ib.*
- 3½. *HEIR.*—*Definition of.*—Under the statutes of this State, an heir is one who succeeds to the estate, both real and personal, immediately upon the death of the ancestor. *Ib.*
4. *Ancestral Personal Property.*—*Sale or Exchange.*—Personal property coming to an intestate by "gift, devise or descent" has impressed upon it, under our statutes, the same ancestral quality as real estate coming to him in the same way; but in order to retain its ancestral character, it must remain and descend *in specie*; it must be the same article or personal property that came from the ancestor; and if it be sold or exchanged for other property, the money thus acquired for it, or the property acquired in exchange is not impressed with the ancestral character of the original. *Ib.*
5. *Payment of Debts of Intestate with Ancestral Personal Property.*—Ancestral personal property may be taken to pay debts in order to save ancestral real estate for another line of heirs, or to save non-ancestral real estate. *Ib.*
6. *Income of Ancestral Property.*—*Property in Custodia Legis.*—Income derived from ancestral property does not partake of the character of such property so far as its descent is concerned; nor does personal property in the hands of a guardian, which has lost its identity with the original property which came into his possession, retain its ancestral character by reason of the fact that it is *in custodia legis*. *Ib.*
7. *Equity Following Property, Rule of not Applicable.*—The rule that a court of equity will follow money or property into whatever form it may assume, for the purpose of upholding an equity, has no application to the devolution of property. *Ib.*

8. *History of Statute and Laws of Descent*.—For a historical discussion of the statute and laws of descent, see opinion. *Id.*

DEVISE.

See DESCENT, 2; GIFT, 1; TRUST, 3; WILL.

DISAFFIRMANCE.

See INSANITY, 1, 2.

DISCRETION.

See CONTINUANCE; PLEADING, 11; TRUST, 6.

DRAINAGE.

See EVIDENCE, 1.

EJECTMENT.

See LEASE, 3, 4.

EQUITY.

See DESCENTS, 7.

ESTOPPEL.

See DEED, 1.

Married Woman.—There can be no element of estoppel as to a married woman where all the parties are fully conversant with her rights in the matter in controversy. *Goff v. Hankins, 456*

EVIDENCE.

See APPELLATE COURT PRACTICE, 1, 7, 10, 14; ARBITRATION, 4; CONTRACT, 3; CRIMINAL LAW, 1, 2; DECEDENTS' ESTATES, 3; HARMLESS ERROR, 1; INTERROGATORIES TO JURY, 2; LEASE, 2, 3, 4, 5, 6; LIFE INSURANCE, 13; PRACTICE, 5; PROMISSORY NOTE, 1; RAILROAD, 2, 5, 6; TRUST, 6.

1. *Opinion Evidence*.—*Drainage*.—The plaintiff, a farmer and owner of land damaged by fire, was competent to give his opinion as to what would be necessary to put the drainage in the damaged land in condition for draining the land, without showing that he was an expert on the subject of drainage.

Terre Haute, etc., R. R. Co. v. Walsh, 13

2. *When Within Issues*.—*Damage to Land by Fire*.—*Amendment of Pleading*.—In an action for damages to fifty-five acres of meadow land, by fire, includes within the issues any portion of the fifty-five acres of meadow which was used for pasturing purposes, and the value of the pasture may be proved; or, as the complaint might have been amended so as to bring such fact in issue, it will be deemed to have been so amended. *Id.*
3. *Repetition of Question*.—*Rejection*.—The following question: "How much wheat, if you know, was delivered to your firm out of cars Nos. 439 and 1889 each from Buck," was properly rejected where the witness had previously stated that he only saw a part of the wheat weighed, and that he could not say how many bushels were in the cars. *Buck v. Pennsylvania Co., 179*
4. *Memorandum of Weights Made by Different Persons*.—There was no error in refusing to admit in evidence a copy of the memorandum of the weights of wagon loads of wheat put in the cars, where the memorandum was made by different persons. *Id.*
5. *Physician and Patient*.—*When Privilege Attaches*.—*Physician Employed by Railroad Company*.—The knowledge acquired from a patient by a physician while treating the patient is confidential; and the fact that the physician was employed and paid by the

defendant railroad company does not prevent the privilege from attaching when the relation of physician and patient actually exists.
New York, etc., R. R. Co. v. Mushrush, 192

6. *Conflict of.—Question for Jury.*—If there be a conflict in the evidence, whether that of the plaintiff or defendant, or of both, it is the province of the trial court or jury to determine which is correct.
DePauw University v. Smith, 313
7. *As to Contents of Letter.—Notice.*—A witness may testify to the contents of a letter written to him by defendant, on preliminary proof of loss having been made; and the letter not being in defendant's possession, notice to produce it was not necessary.
Continental Ins. Co. v. Chew, 330
8. *Res Gestæ.—An Injured Brakeman.*—Statements made by an injured brakeman after he had been removed two hundred feet distant from the place of the accident, and ten minutes after he was injured, in relation to the manner in which the accident occurred, are not part of the *res gestæ*.
Cleveland, etc., R. W. Co. v. Sloan, 401
9. *Tax-assessment List.—When Properly Excluded.*—Where, in an action on a claim against a decedent's estate the preliminary proof shows that the assessment list offered in evidence against the claimant was not hers, and that she did not sign it, there was no error in excluding the tax list from the evidence.
Bartlett, Exr., v. Burden, 419
10. *Certified Tax Assessment.*—A copy of the assessment made for taxation by the State board of equalization, certified by the auditor of State, is competent evidence, in a proper case, to collect taxes; and if it differ from the abstract certified by that officer down to the county auditor, it may be adopted instead of the abstract if there be a mistake in the latter.
Midland R.W. Co. v. State, ex rel., 433
11. *Exclusion of Testimony.—Question, How Saved.*—The exclusion of testimony can only be made available error by asking some pertinent question of the witness, and, if objected to, stating to the court what testimony the witness would give in answer to the question proposed.
Huggins, Admr., v. Hughes, 465
12. *Admissions.—Vendor and Vendee.—Sale.*—In an action by the guardian of remaindermen against the life tenant and others for saw logs alleged to have been sold by the life tenant, it was not error to admit evidence of admission of the alleged sale, by the alleged purchaser, who was also a party defendant, made in the absence of the vendor.
Smith v. Meiser, Guar., 468
13. *Limitation of Application.—Instruction to Jury.*—If the vendor desires to have such evidence limited as affecting only the purchaser, he should have asked the court to instruct the jury to that effect.
Ib.
14. *Vendor and Vendee.—Sale.—Privity in Design.*—To make such evidence competent, as affecting the purchaser, it was not necessary to show that he and the vendor had a joint interest or privity in design.
Ib.
15. *Immaterial.—Harmless Error.*—Evidence of the sales of other timber, ten years previous to that in controversy, was immaterial and harmless.
Ib.
16. *Irrelevant to Issues.—Harmless Error.*—Evidence which is irrelevant to the issue and could not have prejudiced the defendant in any event, is harmless.
Ib.

EXCHANGE.

See DESCENT, 4.

EXECUTION.

1. *Levy on Property of Person Assuming Judgment Debt.*—If a stranger to a judgment agree to pay it off, that will not authorize the levy of an execution issued thereon, upon such person's property.
Shipman Coal, etc., Co. v. Pfeiffer, 445
2. *Consolidation, Levying Execution on Property of Consolidated Companies for debt of old Company.*—If two corporations consolidate under the name of an execution defendant corporation, and the latter supersede the old corporation, assuming all the liabilities, and succeeding to all its rights and privileges, such execution against the old binds the personal property of the new corporation.
Ib.
3. *Sale of Stranger's Property.*—The sale of the property of a person not a party to a judgment and execution is void.
Ib.

EXEMPTION FROM EXECUTION.

See REPLEVIN, 7.

FENCE.

1. *Partition Fence of Barbed Wire.—Negligently Constructed.*—Damages to Stock on Adjoining Premises.—Constructing a barbed wire partition fence in such improper manner that stock of another lawfully pasturing in adjoining premises become entangled in the wires by reason of the improper construction thereof, and is killed, amounts to actionable negligence, for which damages may be recovered.
McFarland v. Swihart, 175
2. *Negligent Construction.—Anticipated Injury.*—In such case, the injuries inflicted were such as any prudent man should have foreseen in the exercise of ordinary care.
Ib.
3. *Notice by Injured Party, of Condition of Fence.*—In the face of an averment by the injured party that he was without fault, he can not be charged with notice of the negligent manner in which the fence was constructed and maintained.
Ib.
4. *Right to Construct.—Liability for Injury to Stock While in Process of Construction.—Negligence.*—An adjoining land-owner has the right to construct a fence on the partition line, subject to agreement and legal conditions, but he must use due care in its erection and leave it in a reasonably safe condition when completed, or respond in damages for injuries to stock of another lawfully pasturing in adjoining premises to his, resulting from such negligence in constructing or defective condition after construction, in the absence of contributory negligence on the part of the complaining party.
Lowe v. Guard, 472

FORFEITURE.

See INSURANCE, 11, 20, 21, 22, 23; LIFE INSURANCE, 9.

FORMER ADJUDICATION.

Reversal on Appeal, with an Order for New Trial.—Dismissal.—Refiling Complaint.—When May Be Tested by Demurrer.—Where, after the reversal of a case by the Supreme Court, with an order granting a new trial, the same was placed upon the docket of the trial court, and was subsequently dismissed by the plaintiffs, but the complaint was, subsequently to the dismissal, refiled, the complaint, after being refiled, may be tested by demurrer where it was not so tested in the original action, and where the complaint

is not set out in full in the report of the former case, so that it may be determined whether it is the same as the one refiled. In such case the principle of *res adjudicata* does not apply.

Phenix Ins. Co. v. Rogers, 72

GIFT.

See DESCENT, 2.

1. *Devise.—Descent.*—Strictly speaking, a gift is not a devise nor a devise a gift, and property, which came by descent, could not have come by either gift or devise.

Rountree, Admx., v. Pursell, 522

2. *Definition.*—To give is to transfer the ownership of property from one person to another gratuitously, without an equivalent or consideration. The gift is the thing transferred. The word "gift," in its larger signification, applies to either realty or personalty. *Id.*

GRAVEL ROAD.

See COUNTY, 3.

GUARANTY.

See MASTER AND SERVANT, 21, 23.

GUARDIAN AND WARD.

See PROMISSORY NOTE, 4.

1. *Use of Principal to Pay Debts and Expenses.*—It is the duty of a guardian to make the income of his ward's estate pay the expenses of such ward; but if necessary or for the interest of the ward, he may pay debts and expenses out of the principal where there is no income available for that purpose.

Rountree, Admx., v. Pursell, 522

2. *Separate Accounts of Income and Principal.*—While it is the duty of a guardian to make the income pay the expenses, yet the law does not require him to keep two separate and distinct funds, or to separate the income from the principal. *Id.*

HARMLESS ERROR.

See EVIDENCE, 15, 16; INSTRUCTIONS TO JURY, 1, 2; RAILROAD, 21; SPECIAL FINDING, 1.

1. *Misconduct of Counsel.—Argument to Jury.—Evidence.—Criminal Law.*—Where the prosecuting attorney, over objection of the defendant, in his argument to the jury, read the birth entry from the family Bible, which was identified by the mother of the prosecuting witness, while on the witness stand, as the entry she had made, and testified that it was a true entry, but which was not read in evidence, the conduct of the prosecutor, if erroneous, was harmless, because the fact as to the age of the prosecuting witness was uncontroverted. *Capron v. State*, 95

2. *Overruling Demurrer to Answer.*—Any error that may have been committed in overruling a demurrer to a paragraph of answer is harmless, where no relief was given under such paragraph.

Everett v. Farrell, 185

HEIR, DEFINITION OF.

See DESCENT, 3.

HUSBAND AND WIFE.

See MARRIED WOMAN.

1. *Use of Wife's Separate Estate by Husband with Wife's Consent.—Trust.*—If the husband, with the wife's consent, use money be-

longing to the wife as part of her separate estate, in his business and for support of his family, without any understanding as to whether the same was a loan or a gift, it will be presumed that, as to such money, the husband is the trustee of the wife, and the husband or his estate is liable to the wife for such money.

Haymond, Admr., v. Bledsoe, 202

2. *Liability of Husband for Wife's Necessaries.—Liability of Wife.—Presumption.*—Where articles furnished to the wife are necessities which the law obligates the husband to furnish, and for the procurement of which she may pledge his credit, the law does not imply a promise on the wife's part to pay therefor, and in order to bind her they must have been furnished on her credit, coupled with a promise on her part to pay therefor.
Nelson, Admr., v. Spaulding, 453
3. *Special Promise of Wife to Pay for Necessaries Furnished Her.*—That the evidence is sufficient to uphold the finding of a special promise by the wife to pay therefor, see opinion. *Ib.*

INCHOATE INTEREST.

See TRUST, 1, 2.

INCUMBRANCE.

See INSURANCE, 20.

INDICTMENT.

See CRIMINAL LAW, 3.

INDORSEE.

See PROMISSORY NOTE, 4.

INFERENCE.

See MASTER AND SERVANT, 16; REAL ESTATE, 5; SPECIAL VERDICT, 3.

INSANITY.

See UNSOUNDNESS OF MIND.

1. *Suit to Annul Contract.—Disaffirmance.*—When an action is brought by or on behalf of a person of unsound mind to rescind a contract, or recover property received under it from such person, it must be averred that the unsoundness of mind continued, and a disaffirmance before suit by his representative, or that after restoration to reason there was a disaffirmance of the contract by the plaintiff.
Voris v. Harshbarger, Admr., 555
2. *Return of Consideration.—Disaffirmance.*—If a person of apparent soundness of mind, not judicially declared to be insane, disaffirms a fair contract, he must restore the consideration and place the opposite party *in statu quo*, when such party did not know of the insanity and acted in a *bona fide* manner; and if he can not restore the consideration the contract can not be disaffirmed. *Ib.*
3. *Necessaries.*—A lunatic is liable for the value of necessities furnished him, and, possibly, even on a note given therefor. *Ib.*

INSTRUCTIONS TO JURY.

See ATTORNEY AND CLIENT; DEED, 2; MASTER AND SERVANT, 17; RAILROAD, 21; SPECIAL FINDING, 1.

1. *Refusal.—Without Foundation in Fact.—Harmless Error.*—The refusal of an instruction relative to the issues was harmless error, if error at all, where an integral fact upon which the instruction was based is shown by the answers to interrogatories to be without foundation in fact. *Wilson v. Western Fruit Co., 89*

2. *Given.—When not Prejudicial Error.*—A party will not be heard to complain of instructions which, in view of the finding and judgment, could not have injured him. *Id.*
3. *Repetition.*—The court is not compelled to repeat its instructions. *Elwood Planing Mill Co. v. Jackson, 181*
4. *Must be Applicable.*—An instruction which is not applicable to the case made by the evidence will be properly refused. *Kepler v. Jessup, 241*
5. *Burden of Proof.*—An instruction as to the burden of proof, even if technically inaccurate, will not avail to reverse a judgment where, when considered in connection with other instructions given, the case is properly put to the jury. *Id.*
6. *How Made Part of Record.—Filing, etc.*—Instructions given, in order to be made a part of the record, must be filed, and the fact of the filing must be shown in the transcript. *Stephenson v. Elliott, 694*

INSURANCE.

See LIFE INSURANCE; PLEADING, 2.

1. *Notice of Loss.—Policy Requiring Notice Forthwith.—Notice in Reasonable Time Sufficient.*—If an insurance policy provide that notice of loss or damage shall be given in writing to the company forthwith, contrary to the statute, providing that any such condition shall be void, all that can be required of the insured is that he give notice of loss within a reasonable time. *Phenix Ins. Co. v. Rogers, 72*
2. *Notice, when Given within Reasonable Time.*—Where the complaint alleges that plaintiffs gave notice within — days after the loss, and as soon as they discovered the same, sufficiently shows the giving of notice within a reasonable time, when construed in connection with the general averment that plaintiffs had performed all the conditions on their part to be performed, except as stated in the complaint, no other exception being mentioned with reference to the giving of notice. *Id.*
3. *Proof of Loss.—Waiver.*—Where, upon due notice of loss, the insurance company notified the insured that it would not pay the insurance, nor any part thereof, for the reason that the property was vacant when the fire occurred, proof of loss was waived. *Id.*
4. *Reformation of Policy.—Necessary Averments.—Complaint.*—In a bill to reform an insurance policy, without an averment that it was the purpose or intention of both parties that an old condition in the policy should be erased or done away with and a new one inserted in its place, or words of such import, no mutual mistake is shown, and the mere averment of the conclusion that the omission to make the change was by the mutual mistake of the parties, will not cure the defect. The bill must show that the contract, as written, was not what both parties to it intended it should be, and it must point out the mistake, and show that it was mutual, and that it was a mistake of fact and not of law. *Id.*
5. *Transfer and Assignment.—Waiver of Conditions as to Notice and Indorsement.*—Conditions in a fire insurance policy providing that the policy shall be void if written notice of a transfer of the property be not given, or if the policy be assigned before loss without the assent of the insurer indorsed thereon, may be waived. *Moffitt v. Phenix Ins. Co., 233*
6. *Assenting to Assignment.—What is Sufficient.*—In assigning a policy,

- any method of assent by which the insurer leads the assured to consider that the assignment is sufficient, is all that is required. *Ib.*
7. *What Amounts to Waiver of Conditions.*—Where at the time of the transfer of insured property the insurer is orally notified of the transfer and assignment, and, having the policy in its possession, with nearly five years to run, consents thereto, and does not avail itself of its right to cancel the policy, but fails to indorse its consent upon the policy, its conduct is such as to mislead the assured and his assignee, and the conditions requiring written notice of transfer, and requiring indorsement upon the policy, will be deemed waived. *Ib.*
 8. *Consent to Transfer.—Effect as to Assignment.*—The insured's consent to a transfer of the property will not be effective as to an assignment of the insurance to the grantee unless such consent is given with knowledge that it is the purpose and agreement of the assured and his grantee to transfer the insurance as well as the property. *Ib.*
 9. *Assignment After Loss.*—A policy of insurance, after the destruction of the property, becomes a mere chose in action, and may be assigned as such. *Ib.*
 10. *Conditions Precedent.—Pleading.*—A general averment that the insured and his grantee and assignee have performed all the conditions of the policy on their part to be performed is a sufficient pleading of the conditions precedent. *Ib.*
 11. *Forfeiture of Policy.—Waiver.—Receiving Overdue Premium.*—If an insurance company accept a premium overdue, with knowledge that loss has occurred within the time the premium was overdue, it thereby waives the forfeiture and restores the policy to its full force and effect, not only as to the future but from the beginning. *Continental Ins. Co. v. Chew, 330*
 12. *Application, Erroneous Statement in, Made by Insurance Agent.—Warranty.*—An answer in the application stating that the insured held title by warranty deed when in fact she held title by descent, even if it amounts to a warranty, will not avoid the policy where it appears that a correct answer was given, but that the agent who wrote the application, probably through some misconception as to the force and purport of the question, wrote an incorrect answer of which the insured had no knowledge. *Ib.*
 13. *Notice of Loss.—Denial of Liability.—Waiver of Proof of Loss.*—A denial of liability by the insurance company after notice of loss obviates the necessity of furnishing proofs of loss. *Ib.*
 14. *Amount of Insurance Distributed.—Recovery.*—Where the amount of the policy is distributed \$450 to house and \$150 on personalty, the amount of recovery for loss of personalty can in no event exceed \$150. *Ib.*
 15. *Void Condition.—Immediate Notice.*—A condition in an insurance policy requiring immediate notice of loss is void, but notice must be given in a reasonable time. *Germania Fire Ins. Co. v. Columbia Enc. Tile Co., 385*
 16. *Special Verdict, Insufficiency as to Notice of Loss.*—The incorporation of evidence relating to notice of loss, into the special finding will not supply the finding of notice as an ultimate fact. *Ib.*
 17. *Condition Precedent.—Notice of Loss.—Special Verdict.*—As notice of loss, unless waived, is a condition precedent to recovery, the special verdict must show a performance or a waiver thereof before there can be a recovery. And a failure to find performance or

- waiver is equivalent to a finding that such fact has not been proved. *Ib.*
18. *Special Verdict.—Evidentiary Facts.—Practice.—Motion for Judgment.—New Trial.*—Where the matters found are mere evidentiary facts, they are equivalent to no finding at all, and, in such case, the question is properly raised by motion for judgment on the verdict or for a new trial. *Ib.*
 19. *Special Verdict.—Notice of Loss.—Proof of Loss.*—A finding upon the subject of "proof of loss" will not supply the finding of notice. *Ib.*
 20. *Clause Forfeiting Policy if Property Insured is Incumbered, Valid.*—A provision in a policy of insurance providing that it shall be void if there is an incumbrance upon the property insured of the date of the issuance of the policy, is valid.
German Mut. Ins. Co. v. Niewedde, 624
 21. *Enforcing Forfeiture.—Construction.*—Courts are averse to giving effect to forfeitures, and construe the contract of insurance most strictly against the insurer, resolving all doubts in favor of the insured. *Ib.*
 22. *Waiver of Terms of Policy.—Forfeiture, Rule of Construction.*—Valid and enforceable provisions of a contract of insurance may be waived not only by express agreement, but by the conduct of the insurer; and in determining whether a harsh and inequitable forfeiture clause is to be deemed waived, the courts generally apply the same liberal rule in favor of the insured as governs in the construction of the contract itself. *Ib.*
 23. *Incumbrance, When Will Not Avoid Policy.—Waiver by Failure to Inquire.*—If there be no written application for insurance, no questions asked, no statements made, and no knowledge by the assured that the existence of the incumbrance on the property insured works a forfeiture of his insurance, the insurer is deemed to have waived the provision of the policy against an incumbrance. *Ib.*

INTENDMENT.

See ARBITRATION, 1.

INTERROGATORIES TO JURY.

See JUDGMENT, 2; MASTER AND SERVANT, 12; VERDICT, 2, 3.

1. *Refusal to Submit.—When not Error.—Record.*—Where the record does not show that interrogatories were presented to the court before the commencement of the argument, there was no error in refusing to submit them to the jury.
Cleveland Stone Co. v. Monroe Co. Oolitic Stone Co., 423
2. *Judgment on Answers to.—Scope of Consideration.—Evidence.*—In determining the right of a party to judgment upon answers to interrogatories the court will not consider what evidence was introduced on the trial, but simply what might have been properly offered under the issues. *Goff v. Hankins, 456*
3. *When General Verdict Can Not Stand.*—If the jury, in answer to interrogatories, find a material fact contrary to what they must have found in order to have reached the general verdict, the general verdict can not stand. *Phillips v. Michaels, Guar., 672*

INTOXICATING LIQUORS.

See CRIMINAL LAW, 1, 2, 3.

1. *Sale to Minor.—Drowning While Intoxicated.—Action Upon Bond*

for Damages.—Proximate Cause.—Sale by Employe, Liability for.—Where a licensed retailer, who, either himself or through an employe acting within the scope of his employment, unlawfully sells or furnishes intoxicating liquors to a minor, whereby the latter becomes intoxicated, and while on his way home in that condition falls into a river and is drowned, an action for damages therefor may be maintained upon his bond.

Boos v. State, ex rel., 257

2. *Criminal Character of Act Does Not Relieve from Liability.*—In such case, the fact that the act of the employe in making the sale or furnishing the liquor to the minor was criminal will not relieve his principal from liability. *Ib.*

ISSUES.

See EVIDENCE, 2, 16.

JOINDER.

See NEGLIGENCE, 24.

JUDICIAL NOTICE.

See CRIMINAL LAW, 1.

JUDGMENT.

See INSURANCE, 18; INTERROGATORIES TO JURY, 2; LEASE, 5; PAYMENT, 2.

1. *Motion in Arrest of.—Sufficiency of Complaint.—Killing Stock on Railroad.*—If a complaint in an action for damages against a railroad company for the killing of stock does not aver that the accident occurred within the county where the action is brought, the defect may be taken advantage of by motion in arrest of judgment. *Louisville, etc., R. W. Co. v. Johnson, 328*

2. *On Answers to Interrogatories.—When Reversible Error.*—It is reversible error to refuse to render judgment on the general verdict where the answers to interrogatories are not sufficient to overthrow the general verdict. *Burke v. Gardner, 475*

3. *By Default.—Application to Set Aside Default.—Notice.*—When an application is made during the term at which the judgment by default was taken, the proper proceeding is by motion without notice. But if made after the term, the application is a new proceeding in the nature of a complaint, and requires notice. However, notice can not be insisted on as a prerequisite where there is an appearance and demurrer.

Albany Land Co. v. McElwaine-Richards Co., 477

4. *By Default.—Application to Set Aside.—When may be Made.*—The defendant could have asked and obtained leave at the same term of court to file an amended complaint or application to set aside the default, and had the cause been continued till the next term he could have filed an amended complaint then. But the judgment by which the court overruled the application was a final determination of the question; and such ruling remained *in fieri* only during such term, unless the cause was postponed until next term. *Ib.*

JURISDICTION.

See APPEARANCE; BASTARDY.

JURY.

See SLANDER, 4.

1. *Voir Dire.—Irrelevant Question.*—In a prosecution for selling

liquor to a minor it was not error to refuse an answer to the question propounded to a jurymen on his *voir dire*: "Do you believe a man who is engaged in the sale of intoxicating liquors under a license is a moral man?" where it does not appear that the question of morality was in issue nor that the defendant was engaged in selling intoxicating liquors. *Pemberton v. State*, 297

2. *Voir Dire.—Mistake of Law.—Challenge for Cause.*—The mere fact that a juror, as shown by his *voir dire*, is mistaken as to the legal effect of the filing of the affidavit and information, is not sufficient cause for challenge. *Ib.*
3. *Competency of Jurymen.*—A juror's competency is not to be determined from one question alone, but from all he says upon the subject. *Ib.*

LABORER'S LIEN.

See PLEADING, 14, 15.

LANDLORD AND TENANT.

See AGENCY; DEED, 1; LEASE, 1.

1. *Possessory Action.—Sufficiency of Complaint.—Expiration of Lease.*—In an action by a landlord to recover possession from a tenant, the complaint sufficiently shows that the tenancy had ceased, where it appears that the lease under which possession was acquired expired May 27, 1893, and that from that time until institution of the action, June 10, 1893, the tenant retained possession unlawfully. *Mason v. Kempf*, 311
2. A tenancy which expires at a stated time requires no notice to terminate it. *Ib.*
3. *Tenant Holding Over.—When not a Tenant from Year to Year.*—A subtenant in possession, and holding over, under a lease subject to renewal, but which has not been renewed, is not a tenant from year to year. *Ib.*

LAW AND FACT.

See APPELLATE COURT PRACTICE, 10; CONTRIBUTORY NEGLIGENCE, 1; EVIDENCE, 6; MASTER AND SERVANT, 13; NEGLIGENCE, 27, 29; RAILROAD, 8, 9.

LEASE.

See DEED, 1; LANDLORD AND TENANT, 1.

1. *Landlord and Tenant.—General Covenant, When Not Limited by Subsequent Special Covenant.*—Immediately after the description of the premises in a lease is the following: "And I will warrant and defend his possession thereto, together with the rights, privilege and appurtenances to the same belonging, to have and to hold the same," etc.; and then after the agreement to pay rent, etc., it proceeds: "Whereas, the minor children of the said S— have an interest in the lot herein leased, said S— hereby agrees to indemnify said B— and save him harmless from any right or claim they have or may assert in said premises during the lease." The two covenants are not in any degree inconsistent, nor is there anything to indicate an intention that the latter and special covenant shall limit the former and general covenant. *Sheets v. Joyner*, 205
2. *Evidence.—Admission of Partition Proceedings.—Erection.—Damages.*—In an action by the assignee of the above lease against the lessor for damages on account of having been evicted by a paramount title, from the real estate leased, the partition proceedings

to which the lessor was a party were admissible in evidence to show the paramount title by which the tenant was evicted. *Ib.*

3. *Evidence.—Judgment in Ejectment Proceedings.—Eviction.*—The judgment against the tenant in ejectment proceedings was admissible to aid in showing eviction by claim of paramount title; but such judgment was not evidence, against the lessor, of paramount title. *Ib.*
4. *Evidence.—Knowledge by Lessor of Ejectment Proceedings Against Tenant.*—Mere knowledge of the ejectment suit by the lessor, acquired by some other source than by notification from the tenant, would not cause her to be bound by the results when she did not in any manner appear therein nor participate in the defense. *Ib.*
5. *Evidence.—Judgments Rendered Subsequent to Commencement of Action.*—Judgments rendered sixty days or more after the commencement of the suit for damages were not competent evidence. *Ib.*
6. *Evidence.—Damages.—Value of Unexpired Term.*—The value of the lease for the unexpired term was proper to be considered in estimating damages for the eviction. *Ib.*

LEGISLATURE.

See DESCENT, 1.

LIBEL.

1. *Injury to Business or Profession.—Complaint, Necessary Averment.*—In an action for libel for an injury to one's profession or business, the business or profession should be pleaded as a substantive and traversable fact. *Houk v. Hicks, 190*
2. *Publication Charging Priest with Immoral Conduct in Orphan Asylum.—Right of Bishop to Maintain Action.*—A bishop of the Catholic Church who, as such, is superintendent of an orphan asylum and responsible for its management and government, and for the character and conduct of employes and instructors therein, may maintain an action for libel upon a publication charging that a young girl, an inmate of the asylum, was incarcerated in a dungeon for refusing to submit to the sexual desires of a priest who officiated in the asylum as instructor, if it appear that the libelous words were published of the plaintiff. *Bidwell v. Rademacher, 218*

LICENSE.

See NEGLIGENCE, 13.

LIEN.

See LABORER'S LIEN.

LIFE INSURANCE.

1. *Deduction of Indebtedness.—Loan to Insured.—Policy Payable to Wife.—Maturity.*—A policy of life insurance was made payable to the insured in a certain sum, "for the term of his natural life, or until prior maturity, for the benefit of the insured if living at" its maturity. If the insured died before the maturity of the policy, the amount named therein was payable to "his wife, if living, otherwise to the executors, administrators or assigns of the insured." The policy matured in fifteen years. It was also a condition of the policy that "In case of the death of the insured prior to the maturity of" the policy, it being in force, the company would pay the amount therein named within sixty days after receipt of notice, "the balance of the year's premiums, if any, and all other indebtedness, being first deducted." The insured died

before the maturity of the policy, his wife surviving him; he, at the time of his death, being indebted in a large sum to the insurance company for money borrowed.

Held, that the amount owed by him for money borrowed could not be deducted from the amount due the wife on the policy, and that she was entitled to receive the full amount of the policy, less the remainder of the year's premiums and any other unpaid premium; that the phrase "other indebtedness" meant premiums due and unpaid for any other year than the year of the insured's death; and that the word "maturity" referred to the maturity of the policy during the lifetime of the insured.

Union Cent. Life Ins. Co. v. Woods, 335

2. *Deducting Amount of Loan Made from Policy.—Validity of Such a Contract.*—A contract providing that the amount of any loan made by the insurer to the insured should first be deducted from the amount due him or the beneficiary under the policy, is valid. *Ib.*
3. *Endowment Policy.*—An endowment policy is one providing for the payment of the sum insured to the person insured if he live to a certain time, or, if he die before that time, to some other person nominated in such policy. *Ib.*
4. *Title to Endowment Policy.*—The title of an endowment policy, payable to a husband, if living at its maturity, or to his wife, if he die before such maturity, does not vest in her absolutely upon its execution, nor until his death, during the period before its maturity; and she can not be divested of such contingent interest without her consent. He also has a contingent interest by which he may divest himself of all his rights under the policy, which will bind him if he survive its maturity. *Ib.*
5. *Construction of Policy of Indemnity.*—Where indemnity is the object for which the insurance is effected, the contract must be liberally construed to that end; and if the language of the policy is equally susceptible of two interpretations, the one giving greater indemnity and sustaining the claim will be adopted. *Ib.*
6. *Assignment of Policy.—Law of Place.*—The assignment of a policy of life insurance in this State, like any chose in action, is governed by the law of this State, though the policy is issued and payable in another State. *Ib.*
7. *Assignment by Married Woman as Surety for Her Husband.*—The assignment by a married woman of a policy of life insurance within this State, issued on the life of her husband, by a married woman to secure a debt owed by him, is void, although such policy was issued and payable in a State where she has contract of suretyship, if entered into there, would have been valid. *Ib.*
8. *Assignment of Policy.—Chattel Mortgage.*—An assignment of a life insurance policy "and all sum or sums of money that may become due by virtue thereof," can not be construed as a chattel mortgage placed upon such sum or sums of money; and if executed by a married woman in this State to secure her husband's debt, it is void, although such sum or sums of money are payable in a State where a married woman may execute a chattel mortgage to secure his debt. *Ib.*
9. *Waiver of Forfeiture.—Collection by Suit of Premiums Past Due.*—If an insurance company sue upon and collect by execution the amount of a note given for the premium of a policy, instead of insisting upon a forfeiture of the policy, it will be deemed to have waived its right to insist upon the forfeiture as a defense. *Ib.*
10. *Manner of Death.—Statements in Proofs not Conclusive.*—The state-

ments in the proofs of death required by an insurance company, either of fact or opinion as to the manner of death, are not conclusive.

Travelers' Ins. Co. v. Nitterhouse, 155

11. *Suicide.—Burden of Proof.*—Where, in defense of an action upon a policy of life insurance, the insurer pleads suicide as the cause of death, the burden is upon the latter to establish this issue by a fair preponderance of the evidence, not by a *prima facie* case alone, but by such proof as will overthrow all the evidence to the contrary. *Ib.*
12. *Presumption Against Suicide.—Doubt as to Cause of Death.—Question for Triers.*—Suicide will not be presumed, but on the contrary the presumption is that the death of an insured was not voluntary, and where the evidence leaves the manner of death in doubt, the conclusion reached by the court or jury trying the case will be upheld. *Ib.*
13. *Shot Wound in Forehead.—Evidence Considered.*—For a consideration of evidence showing death by a pistol shot-wound in the forehead held sufficient to sustain a finding of accidental death, see opinion. *Ib.*

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MALPRACTICE.

See SPECIAL FINDING, 4.

MARRIED WOMAN.

See ESTOPPEL.; HUSBAND AND WIFE; LIFE INSURANCE, 7.

1. *When not Liable for Necessaries of Life Furnished Her.*—A married woman cohabiting with her husband can not be held liable for necessaries of life furnished her, unless she expressly agrees to pay therefor and they are furnished on her credit.
Nelson, Admr., v. O'Neal, 296
2. *Statute Construed.*—The different sections of the statute declaratory of the rights of married women, and for their protection, must all be construed together. *Goff v. Hankins, 456*
3. *Suretyship.*—Whenever the result of a transaction is such as to impose upon the wife's property a liability to answer for the debt of another, she must be regarded as the surety and entitled to the protection of the statute, whether she be a party to any written contract or not. *Ib.*
4. *Suretyship.—Real Estate.—Personal Property.—Mortgage.—Pledge.*—There is no difference in principle, between a mortgage of her real estate and a mortgage or pledge on her personal property. *Ib.*
5. *Suretyship.—Separate Property.—Mortgage.—Pledge.*—Whenever a married woman either pledges or mortgages her separate property to secure the debt of another, she occupies the position of a surety within the statute. *Ib.*

MASTER AND SERVANT.

See DAMAGES, 4, 5, 6; INTOXICATING LIQUORS, 1; NEGLIGENCE, 1, 2, 3, 4, 7, 8, 9, 11, 15, 16, 17, 18, 19; PLEADING, 3, 8.

1. *Obvious Danger.—Personal Injury of Servant.—Nonliability of Master.—Stone Quarry.*—Where it appears that the servant of a stone quarry company, whose duty it was to assist in moving stone from place to place, by the use of a traveler and "dogs," had equal opportunity with the company to observe the position

and appearance of the stone, which fell upon him while he was attaching the "dogs" thereto, inflicting mortal injuries, the position and appearance of the stone being clear and open to the observation of every one, the company is not liable in damages for the death of the servant.

Salem Bedford Stone Co. v. Hobbs, Admr., 27

2. *Negligence.—Personal Injury of Servant.—Liability of Master.—Vice Principal.—Proximate Cause.—Unsafe Place to Work.—Pump Factory.*—C. was the agent and foreman engaged in operating a factory of a corporation engaged in the manufacture of pumps, and, as such agent and foreman, he employed and kept the time of all employes therein, and assigned each employe the work he was required to do, directed what work and how it should be done, and designated the place where each employe should work. W., an employe, was directed by C. to take charge of, operate and manage a certain auger used for boring out wooden tubing for pumps. W. was directed by C. to set the wooden tubing on end, inclined to the north, and to rest the upper ends thereof against a framework overhead, made for the purpose, and located about eight feet north of the auger. While W. was engaged in the discharge of the duties of his employment, C. negligently and carelessly went in behind, and negligently and carelessly, at the same time, ordered E., another employe of the corporation, who was acting under the orders of C., to go in behind and on the north side of said tubing to perform some special service for the corporation, well knowing that W. was busily engaged at said auger, and without in any manner notifying W. of their presence, and in attempting to do the work so ordered by C., by reason of the limited space in which they were attempting to do the work, E. came in contact with the tubing, thereby causing three pieces, ten feet long, to fall upon the back of W. to his great injury, W. being unaware of their presence behind the tubing, and the space in which they were working being not to exceed two feet in width and not sufficient to perform work therein without endangering the safety of W.'s working place, all of which was well known to C.

Held, that C., at the time he gave the order and direction, and fixed the place in which he (C.) and E. should work, stood in the relation of master to W.

Held, also, that the corporation, through C., its agent, violated its duty in failing to keep W.'s working place reasonably safe, and that such violation of duty was the proximate cause of W.'s injury.

Cole Bros. v. Wood, 37

3. *Vice Principal.—Rule.*—The master can not screen himself from responsibility by casting his duties upon another. The person upon whom such duties are laid, no matter what his rank or title may be, is, when he performs the duties of the master, a vice principal. *Ib.*
4. *Vice Principal.—Fellow-Servant.—Combination of Both in Same Person.*—The same individual may combine in his own person the functions of both master and servant, and when such person performs a servant's duty, no matter what his rank or title may be, he is, in the performance of such duty, only a fellow-servant with the others engaged in the same common business, for it is not a question of rank but of duty that must determine their relation. *Ib.*
5. *Respective Duties.—Assumed Risk.*—For a summary of the duties which the master owes to his servant, and *vice versa*, and the du-

- ties which fellow-servants owe to each other, together with the hazards assumed in the employment, see opinion, page 48. *Ib.*
6. *Fellow-Servant.—Vice Principal.—Review of Indiana Cases.*—For a review of the Indiana cases bearing on the fellow-servant and the vice principal rules, see opinion, page 50. *Ib.*
 7. *Duty of Master to Servant.—Delegation of.—Liability.*—A duty which the master owes to the servant can not be delegated to another servant or agent, whether of high degree or low, so as to absolve the master from liability for its nonperformance.
Muncie Pulp Co. v. Jones, 110
 8. *Negligence.—Dangerous Place to Work.*—It is negligence on the part of the master to have in the third floor of its building, where men were set to work, a hole nine feet by twenty-eight, covered with rotten canvas, without any guard about it, or any warning to its employees of its existence. *Ib.*
 9. *Safe Place to Work.—Scope of Rule.*—The duty of the master to keep the working place safe does not cease when he has provided competent men and proper materials to work with. *Ib.*
 10. *When Servant Chargeable with Knowledge of Danger.—Opening in Floor.*—Where it appears that the servant entered the third floor of the building and found a canvas stretched down on it; that he was ordered to lay planks across there to walk on; that he saw his fellow-workmen walk around it and not across it; that he shoved a plank over it, saw it sag down, and placed one board on top of another lest one should break, and thought the canvas was put there to catch a person if he should step on it, the servant ought, in the exercise of reasonable care, to be chargeable with knowledge of the hole under the canvas, and will be deemed to have had actual knowledge thereof. *Ib.*
 11. *Defective Machinery.—Failure to Repair.—Negligence.*—Where an employer has ample notice that machinery which an employee is required to use is, by reason of long continued use and wear and improper adjustment, defective and dangerous, and fails to put the same in proper condition, he is guilty of negligence.
Romona Oolitic Stone Co. v. Phillips, 118
 12. *Contributory Negligence.—Answers to Interrogatories.—Overcoming General Verdict.*—An answer by a jury to interrogatories that an employee, who was injured in the line of his service while operating machinery with which he was familiar, could have avoided the injury by giving attention to where he was putting his hands and what he held in them, is not in itself sufficient to overcome a general verdict giving damages, but it should be further shown that the failure to give such attention was the result of negligence on the employee's part. *Ib.*
 13. *Promise of Master to Repair Defect.—Reliance of Servant Upon Promise.—Increase of Risk.—Question for Jury.*—Where an employee, injured by reason of defective machinery, had continued in the service of the employer in reliance upon the latter's promise to repair, it is ordinarily for the jury to determine whether the defect increased the danger, and whether the employee was exercising due care; and the belief of the employee that his work might be safely done notwithstanding the defect, is not always conclusive on the jury as to whether there was any danger or increase of danger on account of such defect. *Ib.*
 14. *Promise to Repair Absolves from Increased Risk.—Additional Care.*—Where there is a defect in machinery increasing the employee's danger, and the employer promises to repair, and in reliance

- upon this promise the employe continues in the service, the latter is, for a reasonable time, absolved from the assumption of the increased risk, but he must use such additional care, in proportion to the increased and known danger, as a man of ordinary prudence ought to exercise under the circumstances. *Ib.*
15. *Failure of Fellow-servant to Make Repairs Does Not Relieve Master.*—Where a machine hand is injured by reason of a defective belt which the employer had promised to repair, the fact that the omission to remedy the defect occurred through the fault of another servant charged with the duty can not relieve the employer. *Ib.*
 16. *Question of Negligence for Jury, When.—Inferences.—How Considered on Appeal.*—The question of negligence must be submitted to the jury as one of fact not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to inferences which might be fairly drawn from the conceded facts, and, on appeal, such reasonable inferences as the jury might have drawn from the evidence, considered in the light most favorable to the party having the verdict, will not be disturbed. *Ib.*
 17. *Instruction.—Erroneous Theory.*—Where, in an action by an employe against his employer, to recover damages for injuries, the theory of the complaint is that the dangers of the service in which the plaintiff was engaged was increased by reason of defects in machinery which the employer had promised, but failed, to repair, an instruction which tells the jury that among the questions to be considered by them in determining the right of the appellee to recover is whether the place in which the plaintiff was employed was unsafe or the machinery dangerous, without any statement limiting the question to the increased hazard, is erroneous. *Ib.*
 18. *Safe Place, Appliances and Transportation.*—The master is bound to furnish his servant with a reasonably safe place in which to work, and suitable machinery and appliances, and, when he is transported from one place to another, *safe means of transportation.* *Cooper v. Wabash R. R. Co., 211*
 19. *Ordering Servant to Perform Services Outside of His Regular Employment and More Dangerous.*—If the master or other person standing in the relation of superior or vice principal orders a servant into a position of greater danger than exists in the ordinary course of his employment, and which he would not otherwise have incurred, and he obeys, and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness. *Ib.*
 20. *Special Finding.—Recovery.*—That the special finding of facts is not sufficient to support a recovery, see opinion. *Ib.*
 21. *Guaranty Against Injury.—Scope of Guaranty.*—Where a servant, a young girl of fifteen years, employed in a laundry to iron flannels with a flatiron, was, over her objection, set to operating a "mangle," upon the assurance of the master that it was not difficult to manage or dangerous to the operator, "and that he (the master) would take all the risk of any accident that might occur to her by reason of her operating said mangle," the guaranty of the master against injury did not extend to injuries received through the servant's own negligence, but only such as might befall her by reason of the master's negligence or by reason of the

natural dangers incident to the use of the machinery when operated by her in an ordinary and prudent manner.

Phillips v. Michaels, Guar., 672

22. *Contributory Negligence.—Voluntary Act.*—That the injuries complained of were not the result of plaintiff's negligence nor of a voluntary act which must inevitably result in injury, see opinion. *Ib.*
23. *Guaranty Against Injury.—Scope of Guaranty.*—Under such guaranty, if the servant used ordinary care, such as was to be expected of one of her age, intelligence and experience, and nevertheless was injured, the master agreed to answer therefor, and is liable. *Ib.*
24. *Servant of Tender Years Chargeable with Knowledge of what Is Dangerous.*—At the age of fifteen any child of ordinary intelligence must know that to place its hand on a bar of iron heated to a great heat must burn, or to place its fingers between two heavy rollers, where the space is too small to admit them, must result in their being crushed. *Ib.*

MECHANIC'S LIEN.

See LABORER'S LIEN.

MEMORANDUM.

See EVIDENCE, 4.

MINES AND MINING.

See NEGLIGENCE, 10.

MINOR.

See INTOXICATING LIQUORS, 1, 2.

MISCONDUCT OF COUNSEL.

See HARMLESS ERROR, 1.

MISTAKE OF LAW.

See JURY, 2.

MORTGAGE.

See CHATTEL MORTGAGE; DEED, 1; MARRIED WOMAN, 4, 5; REPLEVIN, 1, 7; TRUST, 2, 5.

Statutory Penalty for Failure to Satisfy Mortgage.—Complaint, Sufficiency of.—Presumption.—In an action to recover the \$25 forfeiture for failure and refusal to satisfy a mortgage upon demand after the debt secured by the same has been paid, the complaint is sufficient which establishes the relation of mortgagor and mortgagee, for the relationship once being established, it will be presumed to continue until the contrary is made to appear.

Spaulding v. Sones, 562

MUNICIPAL CORPORATION.

See REAL ESTATE, 3.

1. *Town.—Power of Marshal to Collect Taxes.*—When the town marshal has received the tax duplicate of his town, and the warrants attached thereto, they confer upon him the same powers as an execution issued to him by a justice of the peace, and he may seize the property of any tax-payer on such duplicate, any place within the county wherein such marshal's town is situated.
Town of Andrews v. Sellers, 301
2. *Town.—Enforcement of Street Assessment, Complaint.*—In an action to enforce an assessment for improvement of a street of a town, it

is not necessary to aver that the town had not paid the assessment, if it is averred generally that such assessment was due and unpaid.
Dugger v. Hicks, 374

3. *Ordinance as an Exhibit.*—The ordinance or resolution authorizing the improvement of a street is not a proper exhibit to complaint to enforce a street improvement assessment. *Id.*
4. *Complaint, Details of Ordinance.*—It is not necessary to set out the details of the ordinance ordering a street improvement in a complaint to enforce the lien of an assessment for such improvement. *Id.*
5. *Complaint.—Sufficiency, Contract or Exhibit.—Price of Work.*—The assessment, in an action to enforce a lien for a street improvement, is the foundation of the action, and the complaint is not bad for a failure to aver the width of the road or the depth of the grade. Nor is it necessary to set out a copy of the contract of improvement, nor to allege its specific terms, nor to allege in minute detail what work had been done under the contract, nor to state the price that was to be paid for the entire work, nor to contain a copy or refer to the ordinance, resolution, or contract. *Id.*
6. *Contractor Widening Street.*—The mere fact that the contractor, on his own motion or pursuant to the direction of the town, in making a street improvement, widens such street beyond its original limits, does not invalidate the entire proceedings, and does not constitute a complete bar to an action to recover the benefits assessed against the adjacent owners for the improvement of the street. *Id.*
7. *Notice, Omission in Finding of Court, Concerning.*—A finding by the court that notice of the resolution to improve a street is not insufficient by reason of a failure to state the exact date of the insertion in a newspaper or the length of the publication. *Id.*
8. *Sufficiency of Resolution of Improvement.*—For the sufficiency of a resolution of improvement of the roadway and the sidewalks and gutters, see opinion. *Id.*

NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE; COUNTY, 2; DAMAGES, 11; FENCE, 1, 2, 4; MASTER AND SERVANT, 2, 8, 11, 16; NOTICE, 4; PLEADING, 3; RAILROAD, 8, 10; VERDICT, 2.

1. *Proximate and Efficient Cause.*—If certain forces be set in operation which will naturally and probably lead to a certain result, the predominant cause, or the efficient or procuring cause, is the one first set in motion, and the intermediate causes are but attendant incidents which mark the course of the efficient cause.
Cole Bros. v. Wood, 37
2. *Injury.—Combination of Causes.—Liability.*—If an injury happens while one's own wrongful act is in force and operation, he will not be permitted to escape liability because there was a more immediate cause of the injury, especially if that immediate cause was put in operation by his own wrongful act. To entitle such party from exemption he must show, not only that the injury *might* have happened, but that it *must* have happened, if the act complained of had not been done. *Id.*
3. *Liability of City for Defective Culvert Overflowing Basement Room.—Contributory Negligence.*—If a municipality so negligently construct a sewer that it overflows a basement room of a house, the city is liable in damages, unless the party whose property is in-

jured is himself guilty of contributory negligence in the construction of the building. *City of Valparaiso v. Ramsey*, 215

4. *Reliance on Promise to Repair.—Contributory Negligence.*—The fact that the city promised to repair the defect, and the reliance of the property-owner on such promise, will not relieve the property-owner from the effect of contributory negligence on account of defects in the construction of the building or the arrangement of the premises, during the time of such reliance. *Ib.*
5. *Lack of Knowledge, Averment Concerning Visible Defects.*—A servant is only bound to observe defects that are visible and apparent. *Linton Coal and Min. Co. v. Persons*, 264
6. *Diligence in Discovering Defects.*—Where one ought, by the exercise of reasonable diligence, to have discovered the existence of a certain defect, he is held to have knowledge of such defect. *Ib.*
7. *Master and Servant.—Mining Boss.*—The mining "boss" of a coal mine and an employee under him do not stand in the relation of fellow-servants. *Ib.*
8. *Master and Servant.—Delegating Duty.*—An employer can not delegate his duty so as to escape liability, and section 12 of the act of March 2, 1891 (p. 57), does not relieve him of responsibility for failure to perform his duty. *Ib.*
9. *Master and Servant.—Mining Boss.*—The mere employment of a competent mining boss does not relieve the master from a liability for an injury occasioned by the neglect of such boss. *Ib.*
10. *Action Under Mining Statute.—Contributory Negligence.—Complaint.—Statute Construed.*—In order to state a good cause of action for negligence under the mining law of 1891, against his employer, an employe is required to allege that the negligence on account of which he seeks to recover was the proximate cause of his injury and that he was free from fault. *Ib.*
11. *Proximate Cause.—Railroad.—Master and Servant.—Open Switch.—Absence of Switch Light.—Killing of Fireman.—Violation of Rule by Engineer.*—Where a railroad company negligently leaves a switch open, whereby a passenger train proceeding upon the main track in the night time runs into the switch and collides with a freight train standing upon the side track, killing the fireman of the passenger engine, without his fault, the company is liable, its act being a proximate cause of the injury, although, the switch light having accidentally gone out sometime prior to the collision, the engineer did not stop his train upon observing that there was no light, thus violating a rule of the company providing that the absence of a light was to be regarded as a signal of danger. *Lake Shore, etc., R. R. Co. v. Wilson, Admz.*, 488
12. *Contributory Negligence.—Absence of Switch Light.—Duty to Observe.*—In such case the fireman is not shown to have been guilty of contributory negligence, although required by a rule of the company to keep a constant lookout ahead when not engaged in firing, so as to give notice of danger to the engineer, where it appears that his duties and circumstances at the time were such that he could not have discovered the absence of the switch light in time to have given the engineer warning to stop the train, and where the engineer had notice that the light was not burning at least as early as the fireman could have communicated knowledge of such fact to him and had determined to proceed without stopping his train. *Ib.*
13. *Open Elevator Shaft.—Licensee.*—A person entering a warehouse as a licensee merely and falling down an unprotected elevator

- shaft, to his injury, has, no cause of action against the owner of such warehouse. *South Bend Iron Works v. Langer*, 367
14. *Invitation by Owner of Premises*.—It is only when the injured party comes upon the premises of the owner or proprietor by invitation, express or implied, that the latter assumes the obligation of providing safe and suitable means of ingress and egress, and of moving about the premises. *Ib.*
 15. *Master and Servant*.—*Master Entrusting Performance of Duty to Fellow-Servant*.—If an employe be injured while in the service of his employer, by the negligence of a coemploye engaged in the same general employment, when the master has exercised reasonable care in the selection of such coemploye, the employe who is thus injured can not, as a general rule, recover damages of his employer; but if the master entrusts the performance of a duty he owes directly to such injured servant to a fellow-servant, the negligence of the latter is the negligence of the master, and the master is liable to another servant who is injured by such negligence. *Blondin v. Oolitic Quarry Co.*, 395
 16. *Stone Standing on Edge Falling on Servant*.—(See opinion for facts and liability.) *Ib.*
 17. *Master and Servant, Promise to Repair*.—*Continuing in Service*.—*Danger Imminent*.—Where the master, on being notified by the servant of the defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence; and, if an injury results therefrom, he may recover, except when the danger is so imminent that no prudent man would undertake to perform the service. *Indianapolis, etc., R. W. Co. v. Ott*, 564
 18. *Continuing in Service of Master*.—*Danger Imminent*.—If the danger from continuing in the master's service is so imminent that no one but a person utterly reckless of his personal safety would continue in the service under the circumstances, it would be negligence to continue such service as will bar a recovery. *Ib.*
 19. *Continuing in Master's Service*.—*Presumption*.—The continuance of an employe in the dangerous service of his master, after a promise by the master to repair, during the time reasonably necessary for the employer to repair the defect, does not raise a conclusive presumption of negligence on the part of the employe. Where the danger is equally known to both, the presumption ordinarily is that the employer would not request or direct the employe to do what no one except a person utterly reckless of his own personal safety would do. *Iq.*
 20. *Court Determining Question of Negligence*.—If all the facts and circumstances are before the court, and they are such that only one conclusion can be drawn from them, the question of contributory negligence may be determined as a matter of law. *Ib.*
 21. *Use of Defective Lantern by Brakeman, Promise to Furnish a New One*.—For facts not showing contributory negligence in a brakeman using a defective lantern, and continuing in the service by reason of a promise to furnish a new lantern, see opinion. *Ib.*
 22. *Pleading in General Terms*.—*Vagueness*.—Negligence may be pleaded in general terms under our code, but the allegations must not be so general as to culminate in vagueness or be so uncertain as to admit of almost any kind of proof. If enough be averred to show the existence of a legal duty and its breach, a very slight

- designation that the act done or omitted was committed or omitted in the absence of due care, is sufficient to support a charge of negligence. *Louisville, etc., R. W. Co. v. Hicks, 588*
23. *Complaint, Averment of Negligence.*—In a complaint founded upon a failure to perform a legal duty the act done or omitted to be done should be characterized as having been negligently done or negligently omitted. *Ib.*
 24. *Dependent or Independent Causes, Joinder.*—If there be several causes dependent or independent of each other, all of which contribute to the injury, an action may, in a proper case, be founded upon all or any one of the causes. *Ib.*
 25. *Negating Assumption of Risk.—Averment of Notice.—Specific Control General Allegations.*—The pleader may negative the assumption of the risk on the part of the plaintiff and aver knowledge of the defects on the part of the defendant in general terms, but if he, after making the general allegation, also attempt to state the facts specifically, the specific will control the general allegations. *Ib.*
 26. *Child Non Sui Juris, Negligence of Parent.—Negating Imputed Negligence.*—In an action of a child *non sui juris* for injury occasioned by the negligence of the defendant, the negligence of its custodian is imputed to the child, and therefore the general averment that the injured child was without fault is sufficient to negative the imputed negligence of the parent or custodian. On the trial it must be shown that the custodian was without fault. *Louisville, etc., R. W. Co. v. Sears, 654*
 27. *Child Non Sui Juris a Question for Jury.*—In such an action, whether the plaintiff was *sui juris* or *non sui juris*, is a question of capacity for the jury. *Ib.*
 28. *When Child May Maintain an Action for a Negligent Injury.*—If a child is of such tender years as to be wholly irresponsible, in an action by the child, there should be imputed to it, without limit or qualification, the conduct of the parent or person standing in *loco parentis*, but such is not the rule if the child has capacity to exercise discretion in its own behalf. *Ib.*
 29. *Special Verdict.—Injury to Child.—Finding as to Contributory Negligence, When Jury May Determine.*—The finding in a special verdict that the child had sufficient capacity to exercise reasonable care, and that he was in the exercise of ordinary care, can stand only as ultimate facts, drawn as inferences from given specific facts on which they are predicated. If the jury find the facts specially in relation to the age, experience, capacity, and conduct of the child when injured, and it is indisputable that only one inference can be drawn from the facts, and that is the conclusion that the child was guilty of negligence contributing, as a proximate cause, to its injury, then the finding that the child was not guilty of contributory negligence should be disregarded, but if there is room for a difference of opinion between reasonable men as to the inferences which may fairly be drawn from such facts, then it is proper for the jury to determine the question of contributory negligence. *Ib.*
 30. *Degree of Care Required of a Child Sui Juris.*—In an action by a child who is *sui juris*, for damages for personal injuries sustained by it on account of culpable negligence on the part of the defendant, the latter can not escape liability solely on the ground that the child is chargeable with contributory negligence because it did not exercise the ordinary care that a reasonably prudent adult person should have exercised under similar cir-

cumstances. If the child exercise ordinary care as a reasonably prudent child of the same age, experience, and capacity should have exercised under similar circumstances, it is not guilty of contributory negligence. *Ib.*

31. *Degree of Care Required of a Child Non Sui Juris.*—In an action for negligence by a child *non sui juris*, if it in fact exercised the ordinary care that a reasonably prudent adult person should have exercised under similar circumstances, the negligence of its parents can not be imputed to it to defeat a recovery. *Ib.*
32. *Child Playing in Street.*—A child is not guilty of contributory negligence *per se* by playing in a public street. *Ib.*
33. *Proximate Cause.*—It does not aid the plaintiff in an action based upon a negligent tortious act or omission to show negligence on the part of the defendant, unless such negligent act be also the proximate cause of the injury. *Sirk v. Marion St. R. W. Co.*, 680

NEW TRIAL.

See APPEAL, 1; ASSIGNMENT OF ERRORS, 2; INSURANCE, 18; FORMER ADJUDICATION.

1. *Amount of Judgment Correct.—Erroneous Basis of Assessment.*—If the judgment is correct in amount, it is immaterial that the court adopted an erroneous basis in assessing the amount due.
Midland R. W. Co. v. State, *ex rel.*, 433
2. *Reasons for Should be Definite and Specific.—Appellate Court Practice.*—Reasons assigned in a motion for a new trial must be sufficiently definite and specific that on appeal the error complained of may be readily found, so as not to impose upon the court the task of searching the record for the alleged errors.
Beugnot v. State, *ex rel.*, 620

NOTICE.

See COUNTY, 2; EVIDENCE, 7; INSURANCE, 1, 2, 5, 13, 15, 16, 17, 19; JUDGMENT, 3; FENCE, 3; JUDICIAL NOTICE; MUNICIPAL CORPORATION, 7; NEGLIGENCE, 25; PLEADING, 9; RAILROAD, 12, 13, 14, 19; SHERIFF'S SALE.

1. *Master Must Take Notice that Machinery and Tools Wear Out.*—A master is chargeable with notice of the tendency of machinery and tools to wear out. *Louisville, etc., R. W. Co. v. Hicks*, 588
2. *When Master Not Entitled to Notice.*—If the negligent act is an affirmative one and is done by the master personally, notice to him is involved in doing the act, and the same is true if the negligent act be done by another under his order or direction. *Ib.*
3. *Averment of Notice to Master, When Necessary.*—If the negligent act is one of omission on the part of the master, notice is not necessarily involved in the act itself, and should be directly alleged, or such facts should be averred from which notice follows as a necessary inference. *Ib.*
4. *Notice to Master, General Allegation of Negligence Not Sufficient.*—A complaint must contain a direct averment that the master had notice of the defect causing the injury, or such facts must be averred from which notice arises as a necessary inference, and in such cases a general allegation of negligence is not sufficient. *Ib.*

OFFICE AND OFFICER.

Liability for Wrongful Acts.—Acts Virtute Officii and Acts Colore Officii.—If a wrongful act be done by a public officer, acting as such, he will be liable to the person injured on his official bond, and there

is no legal distinction in this State between acts done *by color of office* and acts done *by virtue of office*.

State, ex rel., v. Walford, 392

ORDINANCE.

See DAMAGES, 9, 10; MUNICIPAL CORPORATION, 3, 4.

PARENT AND CHILD.

See CONTRIBUTORY NEGLIGENCE, 1; NEGLIGENCE, 26, 27, 28, 29, 30.

When Services Not Gratuitous.—Presumption.—A promise by a parent to give to a child land in consideration of board, nursing, care and attention is sufficient to rebut the presumption which arises, when the services are rendered while the parent was living as a member of the child's family, that they were gratuitously rendered.

Stewart, Admr., v. Small, 100

PARTIES.

See LIBEL, 2; PRACTICE, 2, 3, 4; PROMISSORY NOTE, 2.

PARTITION.

See LEASE, 2.

PARTITION FENCE.

See FENCE.

PARTNERSHIP.

See ARBITRATION, 4.

PAYMENT.

1. *Of Sum Less than Debt.—Effect of.*—The payment of a sum less than the amount actually due will not operate as a satisfaction of the entire debt, even though a receipt in full be given, unless there is a positive agreement to receive the sum paid in full discharge.

Kepler v. Jessup, 241

2. *Application of Credits.—Judgment.*—Where an action involves several claims it is not material how credits due the defendant are applied by the jury where there will be in any event a balance which will form the basis of a simple money judgment. *Ib.*

PERSONAL INJURY.

See MASTER AND SERVANT, 1, 2; PLEADING, 8; RAILROAD, 11; STREET RAILROAD.

PERSONAL PROPERTY.

See DESCENT, 3, 4, 5, 6; MARRIED WOMAN, 4.

PHYSICIAN AND PATIENT.

See EVIDENCE, 5.

PLEADING.

See ANSWER; COMPLAINT; CONTRIBUTORY NEGLIGENCE, 4; COUNTERCLAIM; CROSS-COMPLAINT; DECEDENTS' ESTATES, 1, 2; INSURANCE, 10; NEGLIGENCE, 22; PRACTICE, 6.

1. *Complaint.—Theory of.—Can Not be Aided by Reply.*—A complaint must proceed upon a definite theory, and recovery had, if at all, upon that theory, and a reply can not be looked to to bolster up the complaint. *Phenix Ins. Co. v. Rogers, 72*

2. *Condition Against Premises Remaining Unoccupied.—Recovery.—Waiver.*—If there is a condition in the policy against the insured premises remaining unoccupied, and the uncontradicted evidence

is that the premises were unoccupied at the time of the loss, it defeats the insured's right to recover, where there was no waiver of the condition. *Ib.*

3. *Demurrer to Answer.—Carrying Back to Complaint.—Aid from Verdict.*—A demurrer to an answer should be carried back and sustained to a bad complaint to which the answer is addressed, and upon appeal the sufficiency of the complaint will be considered in the same way as if a demurrer had been directed against it, without any aid from the verdict.

Board, etc., v. Stock, 167

4. *Complaint.—Negligence.—Master and Servant.—Servant of Tender Years and Inexperience.—Hazardous Work.*—A complaint for personal injury is sufficient which alleges, in substance, that plaintiff is a boy fifteen years of age, that he was employed to work in and about defendant's mill to wheel sawdust and to clean out shavings and cuttings; that the foreman and president of the defendant company took plaintiff from his usual and customary work and set him to work upon the universal wood-worker, a machine highly dangerous to use and operate, and rendered more dangerous on account of its construction; that appellee was inexperienced and ignorant of the dangerous character of the machine while in operation, because of its rapid motion; and that he was set to work while it was in motion, and while working with the first piece of timber was injured by reason of the manner in which the machine was set.

Elwood Planing Mill Co. v. Jackson, 181

6. *Filing Amended Paragraph—Effect of.*—If a paragraph of a pleading be amended the amended paragraph supersedes the original paragraph, and when the original paragraph goes out of the record by the filing of the amended paragraph, all the rulings concerning it also go out with it.

Tague v. Owens, 200

6. *Argumentative Denial.—Demurrer.*—Available error can not be predicated upon the overruling of a demurrer to a special paragraph of reply which is good as an argumentative denial of the facts averred in the answer to which it is addressed.

Kepler v. Jessup, 241

7. *Complaint, Sufficiency of.—Action by Administrator for Death of His Decedent.—Wife, Children or Next of Kin.*—In an action by an administrator to recover damages for wrongfully causing the death of his decedent, the complaint to be sufficient to withstand a demurrer for want of necessary facts must show that the deceased left a wife, children, or next of kin.

State, ex rel., v. Walford, 392

8. *Complaint, Necessary Allegations.—Master and Servant.—Railroad.—Defective Track.—Personal Injury of Brakeman.*—In an action by a brakeman to recover damages occasioned by the defective condition of the railroad track, the complaint must allege, to show a good cause of action, that the defective condition of the track at the place where defendant was injured was the result of defendant's negligence; or, if not due to defendant's negligence, that defendant knew of the defective and dangerous condition of the track a sufficient length of time prior to the accident to have repaired the same in the exercise of reasonable diligence; or that it was defective and dangerous for such a length of time prior to the accident that defendant, in the exercise of reasonable care, should have discovered and repaired it.

Cleveland, etc., R. W. Co. v. Sloan, 401

9. *Notice of Defective Condition, When Necessary to Allege, When Not.*—If the defendant placed the track in such defective and dangerous condition, it is not necessary to aver that defendant had notice thereof; otherwise such allegation is necessary. *Ib.*
10. *Cross-Complaint.—Chancery Practice.*—The code does not provide for a cross-complaint, but the chancery practice of determining the rights of the parties on each side of a case is recognized by our decisions, and in such cases the rules of pleading and the practice of chancery courts, as modified by the spirit of the code, govern. *Heaton v. Lynch, 408*
11. *Discretionary Power of Court, Cross-Complaint.—Delaying Opposite Party.*—Under the statute providing that the court "may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves," the power to determine a controversy between the parties on the same side, as between themselves, is a discretionary one, and should not be exercised to the detriment of the opposing party by delaying his judgment. *R. S. 1881, section 568. Ib.*
12. *Counterclaim.*—Under the code, a counterclaim embraces both recoupment at common law and the cross-bill in equity. *Shipman Coal, etc., Co. v. Pfeiffer, 445*
13. *Complaint.—Averments of Not Controlled by Bill of Particulars.*—A bill of particulars filed with a complaint does not control the averments of the complaint which are in conflict with the bill. *Chapman v. Elgin, etc., R. W. Co., 632*
14. *Complaint to Foreclose Laborer's Lien.—Contract.*—In an action to foreclose a laborer's lien the complaint need not show the terms of the contract entered into by virtue of which the labor was performed. *Ib.*
15. *Laborer's Lien.—Sufficiency of Complaint.*—That the complaint shows the work performed by plaintiff was in the county of the action, and that it sufficiently shows that plaintiff performed the labor charged in the complaint, see opinion. *Ib.*
16. *Complaint to Foreclose Street Assessment Lien.—Assessment Roll as Exhibit.*—In an action to foreclose a street assessment lien, a copy of the assessment roll, or at least that portion of it which relates to defendant's property, should be made an exhibit of the complaint, to make the complaint sufficient on demurrer or on appeal from judgment by default. *Sloan v. Faurot, 689*
17. *Complaint.—By Assignee.*—A complaint by an assignee of a cause of action must, to be good, show an assignment to plaintiff. *Bozarth v. Mallett, 417*
18. *Complaint.—Failure to Show Cause of Action in Plaintiff.*—A complaint must show a cause of action in favor of plaintiff, else it will be insufficient on demurrer for want of facts. *Ib.*

PLEDGE.

See MARRIED WOMAN, 5.

POSSESSION.

See ADVERSE POSSESSION; LANDLORD AND TENANT, 1.

PRACTICE.

• See APPELLATE COURT PRACTICE; INSURANCE, 18; VERDICT, 1.

1. *Anticipating Defense.*—If the complaint anticipates a defense which, if pleaded by the defendant, would be a bar to the action,

the plaintiff must plead facts sufficient to avoid such defense, or the complaint will be insufficient to withstand a demurrer.

Town of Andrews v. Sellers, 301

2. *New Parties*.—A defendant to an action can not insist that a new party defendant be brought in to settle a controversy purely among the defendants which does not affect the plaintiff.

Heaton v. Lynch, 408

3. *Sufficiency of Petition to Bring in New Parties*.—To make a petition sufficient, under section 277 (R. S. 1881), to bring in a new party, it must be shown that the party sought to be brought in is a necessary party, and it must contain a prayer for relief. *Id.*

4. *New Parties*.—*Demurrer Sustained to a Cross-Complaint*.—"Interpleader Cross-Complaint," *Party to*.—If a person is only a party-defendant to a cross-complaint, and his demurrer is sustained to such cross-complaint, he can not be required to answer a separate and distinct pleading, called an "Interpleader Cross-Complaint," for he is not a party thereto. *Id.*

5. *Erroneously Excluding Testimony*.—*Error Cured*.—If testimony is erroneously excluded in examination of a witness in chief, but it is admitted in cross-examination of such witness, the error is cured.

Midland R. W. Co. v. State, ex rel., 433

6. *Motion to Strike Out Pleading*.—*Bill of Exceptions*.—*Order of Court*.—A motion to strike out a pleading, with the rulings of the court thereon, can be shown only by a bill of exceptions or by special order of court.

Huggins, Admr., v. Hughes, 465

7. *Motion to Strike out Motion*.—*Effect*.—A motion to strike out another motion, if sustained, would be equivalent to overruling the first motion.

Albany Land Co. v. McElwaine-Richards Co., 477

8. *Excessive Damages*.—*Remittitur*.—The trial court may, if it considers the damages excessive in an action of tort, in the exercise of a sound discretion, permit the plaintiff to elect whether he will remit part of the damages or suffer a new trial. If the remittitur is made, the question of excessive damages, as they stand after entering the remittitur, may still be considered on appeal.

Cleveland, etc., R. W. Co. v. Beckett, 547

PRESUMPTION.

See HUSBAND AND WIFE, 2; LIFE INSURANCE, 12; MORTGAGE; NEGLIGENCE, 19; PARENT AND CHILD; RAILROAD, 20; REAL ESTATE, 2; SHERIFF'S SALE; VERDICT, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROMISSORY NOTE.

1. *Ambiguity as to Maker*.—*Signing Corporate Name and Official Name*.—*Parol Evidence Admissible to Clear up Ambiguity, Under Proper Averments*.—Where a promissory note was signed,

"NATIONAL FORGE & IRON CO.,

"MARK SWARTS, President,"

it is ambiguous as to who executed the note, *i. e.*, whether it is the individual note of Swarts (as alleged in the complaint), or the note of the National Forge and Iron Co. (as alleged in answer), or the joint obligation of both, and parol evidence is admissible to clear up the ambiguity.

Swarts v. Cohen, 20

2. *Person Not Signing Note, Compelling Plaintiff to Join as a Defendant.*—The payee of a note can not be compelled to join as a party a person in a suit against the maker, who receives a part of the proceeds of the note and who agrees to pay such note.
Heaton v. Lynch, 408
3. *Want of Consideration, Answer.*—In an action on a promissory note, negotiable by the law merchant, by an assignee before maturity, an answer which only avers that the note was executed without consideration is not sufficient. To make such answer sufficient, it should be averred that the plaintiff was not a *bona fide* purchaser for value.
Voris v. Harshbarger, Admr., 555
4. *Maker of Unsound Mind, Answer.*—*Indorsee.*—*Guardian.*—In an action on such a promissory note, an answer that the maker, at the time of its execution, was a person of unsound mind, constitutes a good defense, even as against a *bona fide* indorsee for value without notice of such unsoundness of mind. Such a defense may be made by the guardian of the maker, appointed after the note is executed.
Id.

PROXIMATE CAUSE.

See INTOXICATING LIQUORS, 1; MASTER AND SERVANT, 2; NEGLIGENCE, 1, 11, 33; RAILROAD, 8, 9.

RAILROAD.

See CONTRIBUTORY NEGLIGENCE, 1; EVIDENCE, 5; JUDGMENT, 1; NEGLIGENCE, 11; PLEADING, 8; REAL ESTATE, 3; STREET RAILROAD.

1. *Permitting Fire to Escape from Right of Way.—Damages.—Sufficiency of Complaint.*—A complaint for damages alleged to have been caused by fire negligently permitted to escape from a railroad company's right of way is sufficient, which alleges that the company negligently permitted combustible material to accumulate on its right of way, and negligently permitted fire to be communicated thereto, from one of its passing engines, and negligently permitted the fire to spread to plaintiff's meadow land, whereby plaintiff was damaged, etc.
Terre Haute, etc., R. R. Co. v. Walsh, 13
2. *Damage to Land by Fire.—Opinion Evidence.—Depreciation in Value.*—The question before the court and jury being as to what extent the meadow had been damaged by the fire, it was not error to allow plaintiff, a farmer, as a witness in his own behalf, to state his opinion as to the depreciation of his meadow from the first to the second year, where it appears that the meadow had been sown four years, and that three crops had been harvested from it.
Id.
3. That the evidence is sufficient to support the verdict against a railroad company for negligently permitting fire to escape from its right of way, onto plaintiff's land, etc., see opinion. *Id.*
4. *Liability for Stock Killed.—Statute Construed.*—The liability of a railroad company, under section 5312, R. S. 1894, for stock killed, is not in any way affected by the terms of section 5323, R. S. 1894, requiring railroad companies to fence their lands, etc.
New York, etc., R. R. Co. v. Zumbaugh, 107
5. *Evidence.—Insufficient Cattle Guard.—Circumstance Against Sufficiency.*—In an action for damages for stock killed by railroad locomotives, by reason of defective cattle guards, the fact that different animals which ought to have been kept out by it, at various times crossed it with apparent ease, is a circumstance tending to establish the insufficiency of the cattle guard.
Id.

6. *Evidence of Insufficiency of Other Guards of Similar Material and Construction.*—Where the vice, if any existed, was inherent in the plan and general make-up of the cattle guard itself, evidence of the insufficiency of another guard three or four miles distant of similar material and construction was competent. *Ib.*
7. *Duty as to Passenger Depot and Platform.—To Whom Extends.*—It is the duty of a railroad company to keep its station and platform in a reasonably safe condition, and to have them reasonably well lighted. Such duty is not limited to actual passengers only, but includes those who come to meet friends or "speed the parting guest." *New York, etc., R. R. Co. v. Mushrush, 192*
8. *Negligently Discharging Passenger at Intermediate Station.—Law and Fact.—Driving in Buggy, in Cold, to Destination.—Injurious Consequences.—Proximate Cause.—Contributory Negligence.*—Where K. purchased a passenger ticket entitling her to passage from A to C, but, by the negligence of the conductor, she was discharged at an intermediate station, B, she having been informed by the conductor, and believed, that the station was C, the place of her destination, and desiring to reach her destination she procured a buggy and driver, and was driven to C, a distance of five miles, through the cold,—the court can not say, as a matter of law, that the injuries she received are not such as were likely to be anticipated as naturally flowing from the negligence of the railroad company in causing her to leave the train at B; or, if not such as would have been reasonably apprehended, that they were not the proximate result of that act; or that K. was in fault in continuing her journey to C, to which place it was the duty of the railroad company to carry her in safety.
Pittsburgh, etc., R. W. Co. v. Klitch, 290
9. *Reasonable Care.—Proximate Cause.—Question of Fact.*—In such case, the jury had the right to infer that the conduct of K. in continuing her journey from B to C was entirely natural and reasonable, and that the original wrongful act was, in the sense of the law, directly responsible for the train of injuries caused by it, including any illness resulting from the ride. *Ib.*
10. *Negligence.—Change or Repair of Track.—Cure.*—A railroad company has the right to make necessary changes or repairs in its track, but in making such changes or repairs, it is required, in the discharge of its duty to its employees, to use reasonable care to provide and maintain the same in reasonably safe condition for the performance of the duties required of its employees. Ordinarily it would be negligence to leave such work, at any time, in an unfinished condition longer than would be required, under the circumstances, in the exercise of reasonable care and diligence, to complete the work.
Cleveland, etc., R. W. Co. v. Sloan, 401
11. *Personal Injury of Brakeman.—Contributory Negligence.—Defective Track.*—A brakeman has the right to assume that the track is in a reasonably safe condition; and the fact that he might, on examination with his lantern, have disclosed the defective and dangerous condition of the track before stepping thereon between the cars, is not sufficient to charge him, as a matter of law, with contributory negligence. *Ib.*
12. *Common Carrier.—Notice by Shipper of Loss or Damage.—Time of.*—While common carriers can not, by contract, relieve themselves from liability for their own negligence, they can, by contract with the shipper, provide for a reasonable time within

which notice of claim for loss or damages shall be given as a condition of liability and the manner of giving it.

Case v. Cleveland, etc., R. W. Co., 517

13. *Common Carrier.—Time of Notice of Damage or Loss.—When Reasonable.*—A provision in a contract of shipment fixing the time at ten days, in which notice of damage or loss shall be given as a prerequisite to liability, is a reasonable one. *Ib.*
14. *Notice of Loss, etc.—Waiver.*—Mere knowledge by the agents of the company that the shipper claimed to have lost some of his stock, coupled with a search therefor along its right of way, did not amount to a waiver. *Ib.*
15. *Reduced Fare for Passengers Purchasing Tickets.—Facilities to Obtain Tickets.*—A railway company may require passengers to procure tickets, or, upon failure to do so, to pay the regular fare, and not the reduced ticket fare; but it must provide proper facilities to enable the passengers to purchase such tickets.
Cleveland, etc., R. W. Co. v. Beckett, 547
16. *Failure to Furnish Facilities to Purchase Ticket.*—Before a railway company can demand of a passenger more than the regular ticket fare, it must furnish facilities to such passenger for the purchase of a ticket at the place where he enters the cars; and if he is not furnished such facilities, or is refused a ticket, he may enter the car and tender only the regular ticket fare. *Ib.*
17. *Wrongful Act of Servant Acting Under Rules of Company.*—A railway company can not justify its own wrongful conduct by the fact that the servants were acting according to its directions or rules. *Ib.*
18. *Use of Same Track by Two Companies' Trains.—Sale of Tickets.—Agency.*—Where the trains of one railroad company, by an arrangement between it and another company, use the track of the latter company between certain points, and regularly stop at intermediate stations to receive and discharge passengers, to whom tickets bearing the names of both companies are sold in the usual way by the local company's ticket agent, the proceeds being divided between the two companies, the local company will be deemed the agent of the other in issuing tickets, and the latter is bound to accept them.
Pittsburgh, etc., R. W. Co. v. Berryman, 640
19. *Agent's Authority.—Purchase of Ticket Without Notice of Revocation.—Duty of Company to Accept.—Ejection of Passenger.*—Where a railroad company runs its trains regularly over a part of the line of another company, customarily stops at intermediate stations to receive and discharge passengers, and accepts tickets sold by the latter company's agent, and by its conduct leads the public to believe that the local company's agents are authorized to sell tickets for use upon its trains, it is bound to accept a ticket from, and is liable for ejecting, a passenger who (with knowledge of the custom and relying upon the local agent's authority, without notice of its withdrawal) purchased the ticket in the ordinary course after the revocation of the agent's authority to sell that kind of a ticket. *Ib.*
20. *Ticket Bearing Names of Two Companies.—Presumption.*—Where one railroad company, between certain points, uses the track of another company, and, at intermediate stations, tickets bearing the names of both companies are sold to passengers, without limiting words upon the face thereof, it is an indication to passengers who know that the trains of both companies run over the same track,

that the ticket is intended for use upon the trains of either company. *Ib.*

21. *When Erroneous Instruction Harmless.*—Instructions going to the question of the defendant's duty to accept the ticket tendered by the plaintiff, although incorrect, will be deemed harmless, and not available for a reversal of the judgment where the verdict rightfully determines the duty of the defendant in that particular. *Ib.*
22. *Damages.—Measure of.—Excessive Damages.*—As there is no standard by which the damages sustained by a passenger by reason of a wrongful public expulsion from a train can be accurately measured, the amount fixed by the jury in this case will not be disturbed on appeal. *Ib.*

REAL ESTATE.

See *MARRIED WOMAN*, 4; *TRUST*, 1, 2.

1. *Trespass and Wrongful Appropriation.—Averments as to Ownership.*—Where, in a complaint to recover damages for a trespass upon and wrongful appropriation of land, the averments as to ownership show title in the plaintiff, the complaint will withstand a demurrer, although such averments are not as clear and specific as the rules of careful pleading require.
Pittsburgh, etc., R. W. Co. v. Harper, 481
2. *Presumption as to Continuance of Ownership.*—An averment that the plaintiff was the owner of the land on the 26th of May, and that the wrong complained of occurred on the 28th of the same month, is sufficient to show ownership on the latter day, as ownership and occupancy are presumed to continue until the contrary is made to appear. *Ib.*
3. *Railroad.—Street.—Grant of Right of Way by Municipal Authorities.—Damages.—Abutting Owner's Right of Action.*—The owner of land abutting on a highway or street is not debarred from recovering damages from a railroad company constructing a track thereon, by the fact that the municipal authorities have granted the company a right of way over such street or highway. *Ib.*
4. *Proof as to Quantity of Land Taken.*—It is not essential to the maintenance of the action, that the plaintiff should prove the exact width or dimensions of the land appropriated, if it be shown that some land was taken. *Ib.*
5. *Duration of Injury.—Inferences by Jury.*—Where a railroad company wrongfully appropriates a strip of ground and constructs thereon a side track, the probable duration of the injury may be inferred by the jury from the facts as to the use actually made of the siding and of the land upon which it is constructed. *Ib.*
6. *Adverse Possession.—Occupancy by Third Person.*—The erection of telegraph poles upon the ground in controversy by another corporation, which permitted the railroad company to use one of its wires, can not be made the basis of a claim of title or adverse possession by the latter. *Ib.*
7. *Assessment of Damages.—Special Statute.—Remedy by Independent Action.*—Where the owner of land acquiesces in the appropriation thereof by a railroad company, he is not bound to proceed under the special statute for the assessment of damages, but may recover in an independent action for the permanent injury sustained. *Ib.*

RECORD.

See *APPELLATE COURT PRACTICE*, 3, 12; *INTERROGATORIES TO JURY*, 1, 6.

RECOVERY.

See APPELLATE COURT PRACTICE, 8; CONTRACT, 2; INSURANCE, 14; PLEADING, 2.

REFORMATION OF INSTRUMENT.

See INSURANCE, 4.

REMEDY.

See REAL ESTATE, 7.

REMITTITUR.

See PRACTICE, 8.

REPLEVIN.

1. *Property not Included in Mortgage.—Subsequent Mortgagee.—Sale.*—*Title.*—Where A sold a printing press, including blanket, stocks, wrenches and overhead fixtures for power, on payments, on which a mortgage was executed to secure the deferred payments, and in addition to the above described property a paper folder without additional price, which was not included in the mortgage, A can not replevy the paper folder from C, who was a purchaser for value, from B, in reliance on the public records of both A's and B's mortgages, which disclosed no lien on the folder, and who, in accordance with the terms of his mortgage on the folder and the other property above mentioned, executed subsequently to A's mortgage, advertised and sold the folder at public auction and became the purchaser thereof and took possession of the same.

Van Allen v. Smith, 103

2. *Affidavit, Failure to File, Effect.—Taxes.*—If no affidavit accompanies a complaint in replevin, the plaintiff is not entitled to possession of the property; but the action proceeds so that the title to the property or right to its possession may be determined; and a failure to aver that the property was taken for a tax does not render the complaint bad. *Town of Andrews v. Sellers, 301*
3. *Property Taken for Taxes.—Trover.*—Replevin, under our statute, is a possessory action, and if it appear upon the trial that the property was taken for a tax, the plaintiff will not be entitled to it. In such a case, if the seizure was wrongful, the injured party is remitted to his action for trespass or trover or other proper action. *Ib.*
4. *Illegality of Taxes.*—If it appear that the property was seized for taxes, the illegality of the tax can not be considered. *Ib.*
5. *Stranger's Property Seized for a Tax.*—If the property of a person is seized who does not owe the tax, he may maintain replevin for the property against the tax collector seizing such property. *Ib.*
6. *General Denial.*—Anything which will tend to defeat plaintiff's claim of title, or right of possession, in replevin, may be given in evidence under the general denial.

Shipman Coal, etc., Co. v. Pfeiffer, 445

7. *Property Claimed as Exempt from Execution.—Refusal to Set Same Off to Defendant.—Mortgaged Property.*—Where the judgment defendant, after levy and before sale, presented to the sheriff a schedule of all his property of every description whatever, and demanded that the property described in the complaint be set off to him as exempt from execution, and the property was appraised according to law, but the sheriff refused to set the same off to such defendant, he being a householder and entitled to such ex-

emption, the judgment defendant may replevy the same. The fact that the property was mortgaged did not deprive defendant of the right to have the same exempted.

Adams, Sheriff, etc., v. Hessian, 598

REPLY.

See PLEADING, 1.

RES ADJUDICATA.

See APPELLATE COURT PRACTICE, 11; FORMER ADJUDICATION; TRUST, 5.

RES GESTÆ.

See EVIDENCE, 8.

SALE.

See CRIMINAL LAW, 1, 2, 3; DESCENT, 4; EVIDENCE, 12, 13, 14, 15; EXECUTION, 3; INTOXICATING LIQUORS, 1, 2; REPLEVIN, 1.

1. *Goods Damaged and Rendered Worthless in Transit.—Failure to Return.—Bananas.*—Where A ordered a car load of bananas of B, and B shipped them in a common box car instead of a refrigerator car, as was usual and customary, and in course of transit they were frozen and rendered worthless, A lost no rights by its failure to return them, since they were of no value.

Wilson v. Western Fruit Co., 89

2. *Duty of Vendor in Preparing for Shipment.—Bananas.*—It was the duty of B, in delivering the goods for shipment, to use reasonable diligence and care that the bananas were safely packed in proper manner to insure a safe carriage, and the risk of B's negligence in this regard was not imposed upon A by mere delivery of the goods to the carrier. *Ib.*

SET-OFF.

See DEED, 1.

SHERIFF'S SALE.

Notice of Recorded Mortgages.—Presumption of Duty Performed.—The sheriff is bound to take notice of recorded mortgages, and he must require the purchaser to comply with the conditions thereof before placing him in possession, and in that regard it will be presumed that the sheriff did his duty.

Adams, Sheriff, etc., v. Hessian, 598

SLANDER.

1. *Complaint.—Averment as to Sex.*—Where a complaint for slander gives the plaintiff a feminine name and uses pronouns designating the feminine gender, it sufficiently shows that the plaintiff is a female. *Cosand v. Lee, 511*
2. *Words Charging Fornication, etc.*—Under the statute (section 286, R. S. 1881), words which are sufficient to charge a female with incest, fornication, adultery or whoredom, are actionable, whether they charge a crime or not. *Ib.*
3. *Words Not Actionable Per Se Must be Spoken and Understood in Slandorous Sense.*—The following words: "Ah, Flora, you want to come home and have another young one like you did last summer," or "Ah, Flora, you want to come home and lose another young one like you did last summer," are not actionable *per se*, and a complaint declaring upon them must, to be good, show by the innuendo not only that the words were slanderously uttered, but that they were so understood by the hearers. *Ib.*

4. *Words Capable of Two Constructions.—Province of Jury.*—When the words alleged to have been spoken are capable of two constructions, one of which would be innocent, it is for the jury to determine whether they were used and understood in that sense or otherwise. *Ib.*

SPECIAL FINDING.

See DAMAGES, 2.

1. *Instructions to Jury.—Harmless Error.*—Where a special finding is requested, the giving of an instruction which could not have affected the verdict was harmless.

Western Union Tel. Co. v. Stratemeier, 601

2. *Sufficiency of Finding.—As Strong as Pleading.*—Where a pleading has been held good on demurrer, and the facts found are as strong as they are pleaded, the finding is sufficient. *Ib.*

3. *When will Override General Verdict.*—The special findings override the general verdict only when both can not stand, and this antagonism must be apparent upon the face of the record beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of a party against whom a general verdict has been rendered. *Bedford v. Spilman, 684*

4. *Facts Found.—Malpractice.*—For special findings that do not override the general verdict in favor of plaintiff, in an action for malpractice in failing to properly reduce a fracture of a bone and replace dislocated parts of the wrist, etc., see opinion. *Ib.*

SPECIAL VERDICT.

See APPELLATE COURT PRACTICE, 3; INSURANCE, 16, 17, 18, 19; NEGLIGENCE, 29; VERDICT, 1.

1. *Additional Findings, Motion for.—Practice, Appellate Court.*—No question is presented on appeal upon an oral motion in the trial court to require a jury, which has brought in a special verdict, to return to the jury room and find upon other facts, unless the motion is brought into the record. *Boos v. State, ex rel., 257*

2. *Venire de Novo.*—A *venire de novo* will only be awarded where the special verdict is ambiguous, indefinite or wanting in form. *Ib.*

3. *When Not Aided by Inference or Intendment.—How Construed.*—A special verdict will be construed reasonably and fairly, but it must contain within itself, without aid by intendment or inference, other than those which necessarily follow, all those essential facts which are required to authorize a recovery by the party upon whom rests the burden of proof.

Sirk v. Marion St. R. W. Co., 680

STATUTE CONSTRUED.

See MARRIED WOMAN, 2; NEGLIGENCE, 10; RAILROAD, 4.

STATUTE OF LIMITATIONS.

See DECEDENTS' ESTATES, 2; TRUST, 4.

STREET ASSESSMENT.

See MUNICIPAL CORPORATION, 2; PLEADING, 16.

STREET RAILROAD.

Personal Injury of Passenger.—When Not Liable.—Contributory Negligence.—Giving Signals.—Where a street-car passenger gave a signal (as it was the custom of passengers to sometimes do) to stop at the next street crossing, and in obedience to the signal the mo-

torman slowed up at the crossing and came almost to a standstill, when the passenger gave another signal (as she intended) to stop, and about the same time stepped from the car, and while she was in the act of alighting the speed of the car was greatly accelerated, causing her to fall to the ground, etc., the railroad company is not liable in damages for injuries sustained, it not appearing but that the second signal given by her was the regular signal to start up the car, nor that the motorman knew, or by the exercise of due care might have known, that she was not yet off, but was in a position of danger should he start up the car, nor that the car would not have come to a full stop had she delayed giving the second signal.

Sirk v. Marion Street R. W. Co., 680

STREETS AND ALLEYS.

See DAMAGES, 9, 10, 11, 12.

SUI JURIS.

See CONTRIBUTORY NEGLIGENCE, 1; NEGLIGENCE, 26, 27; 30, 31.

SUPERIOR COURT.

See APPEAL, 3.

SURETYSHIP.

See LIFE INSURANCE, 7; MARRIED WOMAN, 3, 4, 5.

TAXES.

See EVIDENCE, 9, 10; MUNICIPAL CORPORATION, 1; REPLEVIN, 2, 3, 4, 5.

1. *Demand Before Levy*.—A seizure of property for taxes is not illegal because of the failure of the tax collector to first make a demand of payment of the person owing for such taxes.

Town of Andrews v. Sellers, 301

2. *Suit on Delivery Bond*.—*Averments of Complaint*.—In a suit on a bond given to secure the release of personal property levied upon, the averment that the taxes were properly levied by the proper board of county commissioners, for State, county, school and other purposes, in a certain amount, is sufficient to include all the precedent steps requisite to make a valid tax.

Midland R. W. Co. v. State, ex rel., 433

3. *Same*.—*Demand for Redelivery of Property*.—In a suit on such a bond, wherein it is specified when the property shall be redelivered to the county treasurer, a demand before bringing suit need not be made. *Ib.*
4. *Excuse for Failure to Redeliver Property*.—If the defendant has any excuse for his failure to redeliver the property, he must set it up in his defense; such a defense as that the property was not owned by the person against whom the taxes were assessed. *Ib.*
5. *Allegation that Article Levied on was Personal Property*.—In a suit on such a bond it is not necessary to allege that the article levied on was personal property. *Ib.*
6. *Failure to Use Dollar Marks in Assessment Sheets*.—A failure to use the dollar mark (or any other similar sign) in front of the amount of the valuation of property in the assessment sheets does not render the assessment void; and this is especially true if it can be gathered from the entire assessment that the dollar mark was intended to be used but was accidentally omitted. *Ib.*
7. *Proof of Validity of Tax Assessment*.—In an action on a delivery bond given to recover the possession of personal property levied

upon for taxes, the plaintiff is not required to prove that the taxes were legally assessed. R. S. 1881, section 6498. *Id.*

TELEGRAPH COMPANY.

See DAMAGES, 8.

THEORY.

See MASTER AND SERVANT, 17; PLEADING, 1.

TITLE.

See DESCENT, 3; REPLEVIN, 1.

TOWN.

See MUNICIPAL CORPORATION, 1, 2.

TOWNSHIP, CIVIL.

See APPEAL, 2.

TOWNSHIP TRUSTEE.

See APPEAL, 2.

TRESPASS.

See DAMAGES, 2; REAL ESTATE, 1.

TRESPASSER.

See CONTRIBUTORY NEGLIGENCE, 3.

TRUST.

See HUSBAND AND WIFE, 1.

1. *Express Trust in Land.—Parol Agreement to Hold Proceeds of Sale of Land in Trust.—Consideration.—Inchoate Interest.*—While an express trust in land can not be established by parol, a parol agreement to hold the proceeds of a sale of the land, in trust for another, is valid, if based upon a sufficient consideration, and the conveyance, by a wife, of her inchoate interest is sufficient consideration to establish such a trust.

Talbott, Admr., v. Barber, 1

2. *Parol Agreement of Mortgagee to Hold Part of Proceeds of Sale of Mortgaged Lands in Trust for Wife.—Inchoate Interest.—Statute of Frauds.—Fraud.*—Where the wife joined with her husband in executing a mortgage upon his real estate, as security to an existing creditor of the husband, and the wife joined therein only upon the parol agreement of the mortgagee that in consideration of her signing the mortgage with her husband, and of her agreement then made, that she would not appear to or resist a foreclosure of the mortgage, and that she would not redeem from the sale to be made on the foreclosure of the mortgage, he (the mortgagee) would take and foreclose the mortgage, and purchase the lands at the foreclosure sale, and would hold one-third of the land for her, and would protect her inchoate interest therein, and, as soon as he could sell the land, would pay her one-third of whatever should be realized from the sale of the lands,—the mortgage as executed in connection with the parol agreement was not the creation of a trust in or concerning lands within the meaning of either of sections 3391 or 6631, R. S. 1894, nor was it a trust "in goods or things in action," as contemplated by section 6631, *supra*. The only thing the mortgagee was to do was to hold for, and pay to, the wife one-third of the proceeds of the sale, which was not an express trust in real estate, but in the proceeds of sale; and where the original agreement itself relates to the proceeds there need be no other promise after the sale is made. To establish

such trust it is not necessary that the transaction should be tainted with fraud, but it is sufficient to bring the facts within the rule that (if the transaction would result in fraud upon the wife) the statute of frauds and trusts can not be used as an instrument to work a fraud. *Ib.*

3. *Devisee Acquiring Property Upon Which a Trust is Impressed.—Liability for.*—In such case, where the mortgagee had purchased the lands at sheriff's sale, according to agreement, but died testate before receiving the deed therefor, having devised all such lands to his wife, who obtained a sheriff's deed therefor, with full knowledge of the trust, and sold the same, receiving therefor \$8,000, and held the same until her death, although often requested to pay to the beneficiary the one-third of the purchase-price, which she neglected to do, the estate of the mortgagee's wife will be held liable for the trust interest. *Ib.*
4. *Statute of Limitations.—Continuing or Executory Trust.*—The trust being a continuing or executory one, the statute did not begin to run, even after the sale, until there was a disavowal of the trust or a refusal to perform upon proper demands, and the action being commenced within less than four years after the sale, it was not barred. *Ib.*
5. *Res Adjudicata.—Foreclosure of Mortgage.—Default.*—The fact that the wife, the *cestui que trust*, was made a party to the foreclosure proceeding, was duly served with process, and made default, would not amount to *res adjudicata* so as to debar a suit on the trust agreement, where the default was a part of the special agreement creating the trust. *Ib.*
6. *Evidence.—Decedent's Estate.—Permitting Claimant to Testify.—Abuse of Discretion.*—Where plaintiff's two daughters, competent witnesses, had, as the court determined, made out a *prima facie* case for plaintiff, it was not error, under such circumstances, for the court, of its own motion, to call the plaintiff to the witness stand and permit her to give her version of the transaction in relation to the trust, the suit being a claim against a decedent's estate. *Ib.*

UNSOUNDNESS OF MIND.

See PROMISSORY NOTE, 4.

VARIANCE.

See CONTRACT, 2.

VENDOR AND VENDEE.

See EVIDENCE, 12, 13, 14.

VENIRE DE NOVO.

See SPECIAL VERDICT, 2.

VERDICT.

See APPELLATE COURT PRACTICE, 10; DAMAGES, 2; INTERROGATORIES TO JURY, 3; PLEADING, 3.

1. *Receiving General Verdict.—Special Verdict Requested.—When Reversible Error.—Practice.*—When a special verdict has been requested, the party requesting it should object to the court's receiving a general verdict, otherwise the right to have a special verdict returned is waived. And if the court receives the general verdict notwithstanding such objection, and proper exception is saved, it will be reversible error. *Tague v. Owens, 200*

2. *Negligence, Presumption on General Verdict.—Interrogatories.*—In an action for negligence, the presumption is that the jury, by their general verdict, have found every material allegation of the complaint to have been proven; and that presumption conclusively prevails on appeal unless the contrary is clearly shown by the answers to the interrogatories.

Indianapolis Union R. W. Co. v. Ott, 564

3. *Interrogatories Overriding General Verdict.*—The special findings override the general verdict only when both can not stand; and this antagonism must be apparent upon the face of the record beyond the possibility of being removed by any evidence, legitimately admissible under the issues, before judgment can be given against the party for whom the general verdict was returned.

Ib.

VICE PRINCIPAL.

See MASTER AND SERVANT, 1, 2, 3, 4, 6.

WAIVER.

See APPELLATE COURT PRACTICE, 2; INSURANCE, 3, 5, 7, 11, 13, 22, 23; LIFE INSURANCE, 9; PLEADING, 2.

WARRANTY.

See INSURANCE, 12. .

WILL.

"Devise" and "Bequest" Defined.—The word "devise" usually relates to real estate acquired through a will. It is a gift by will of real estate, and can not be applied, with legal precision, to personal property. A "bequest" is a gift by will of personal property; but in order to favor the manifest intention of the testator, the courts often construe the word "bequest" to mean "devise," and "devise" to mean "bequest."

Rountree, Admz., v. Pursell, 522

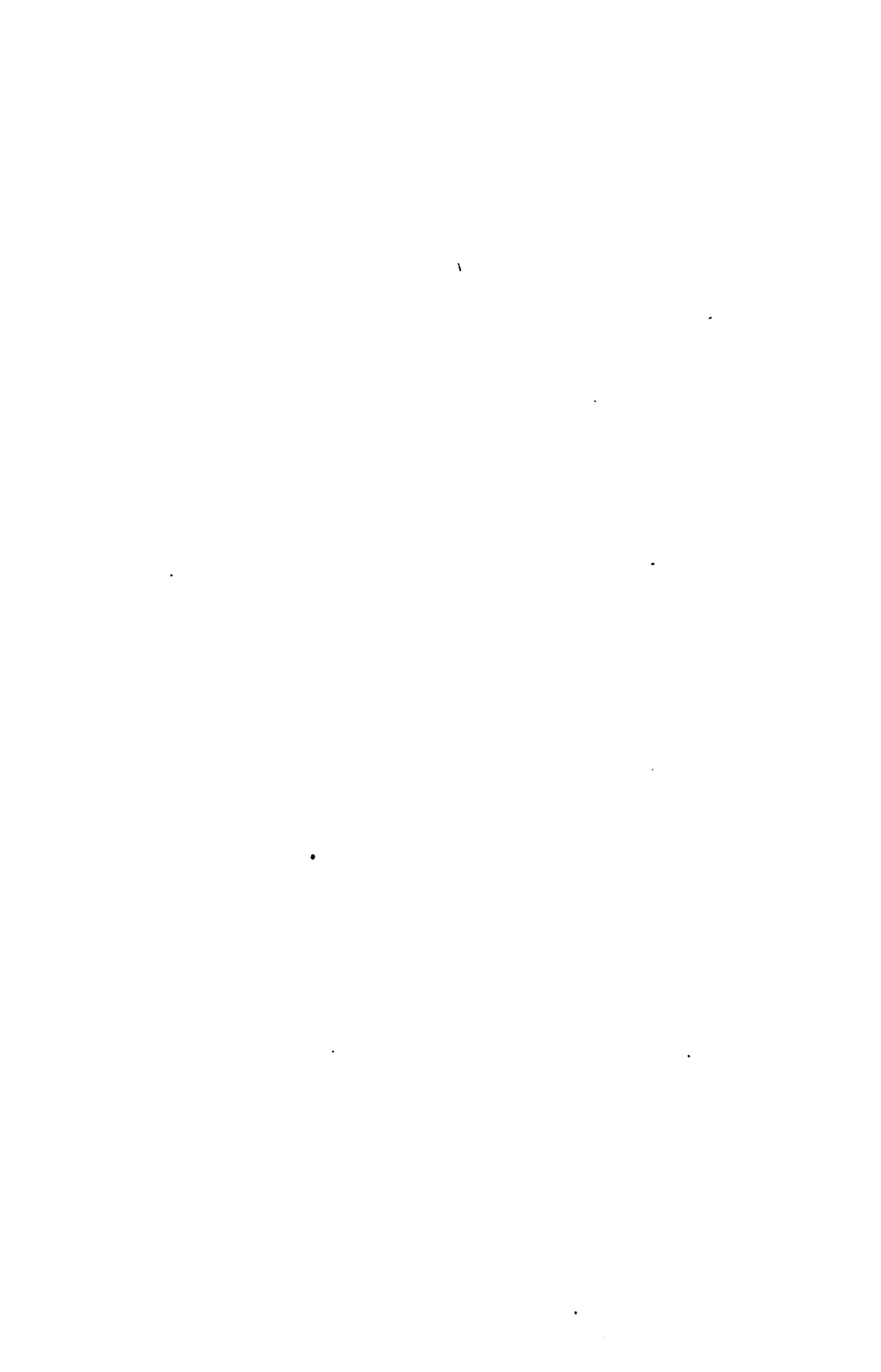
WITNESS.

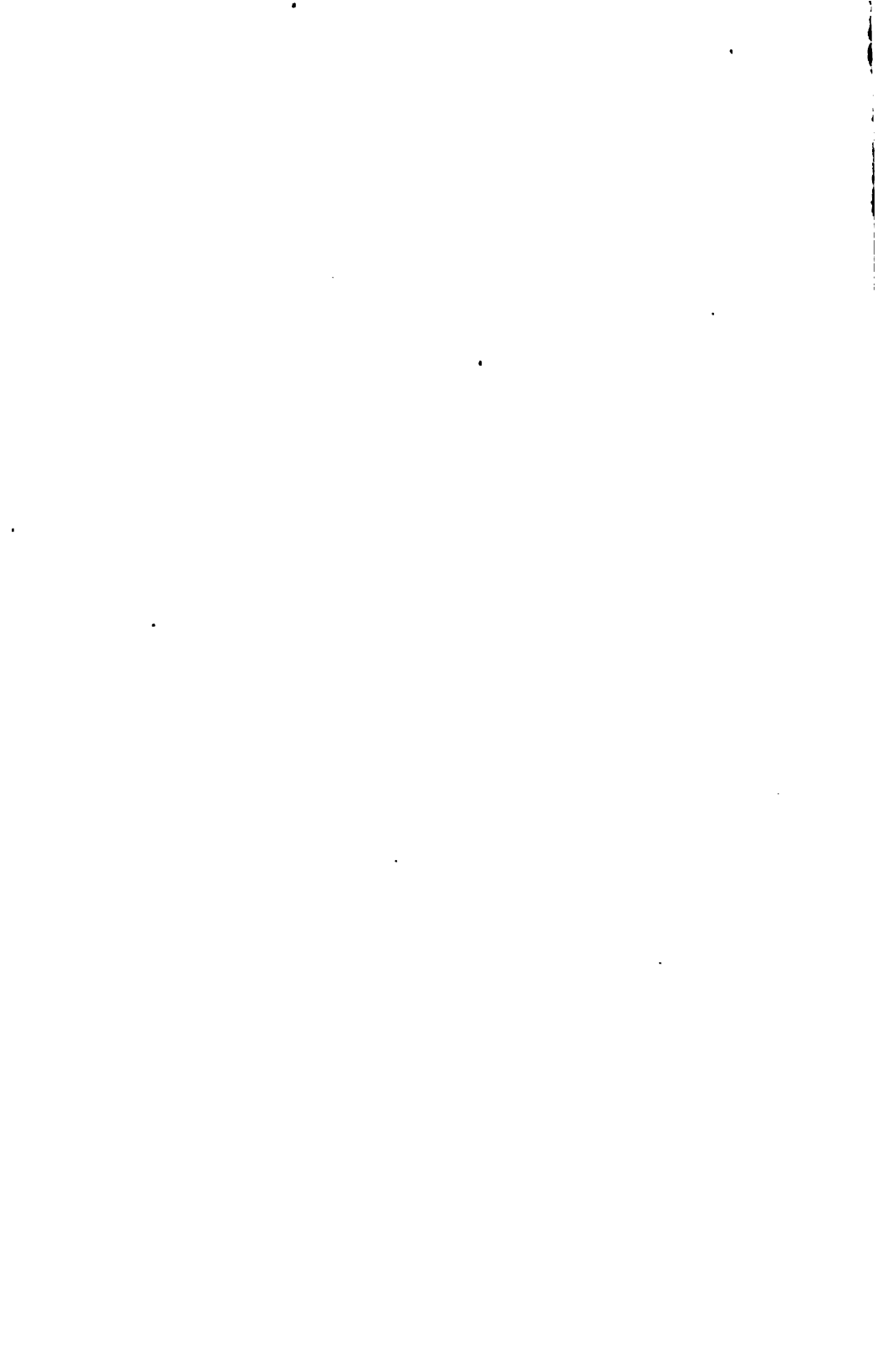
Claimant Against Decedent's Estate.—When Competent.—Where a claimant has been called to the witness stand, and was sworn and testified as a witness for the decedent's estate, the barrier to her competency as a witness was removed, and she may testify in her own behalf.

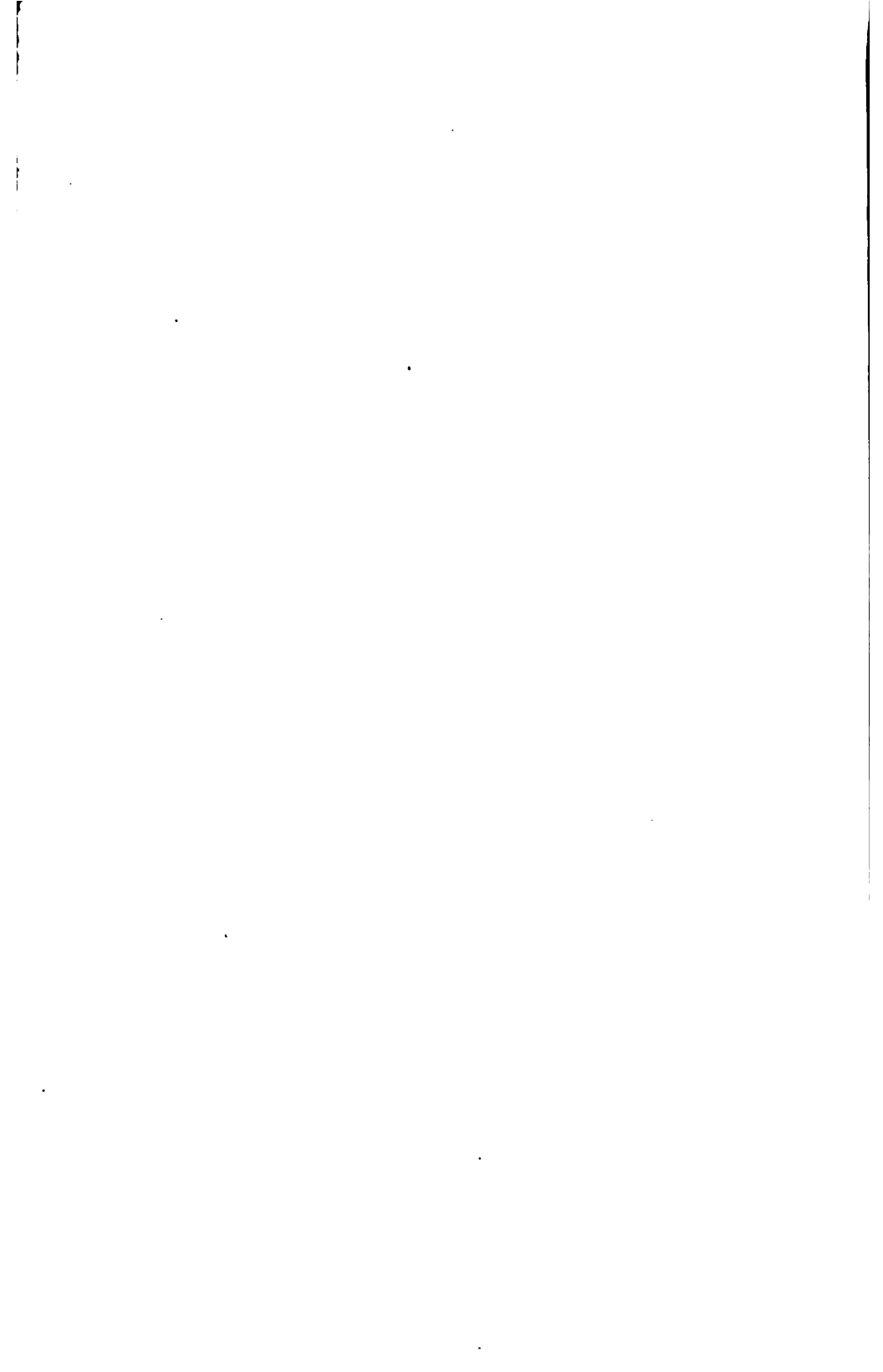
Bartlett, Exr., v. Burden, 419

E. L. L.

END OF VOLUME ELEVEN.











HARVARD

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